Filed 4/2/12 Certified for partial publication 4/18/12 (order attached)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

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| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>JAMES BORG,<br>Defendant and Appellant. | A129258<br>(San Francisco County Super. Ct. No. 209487) |

Defendant was convicted following a jury trial of stalking (Pen. Code, § 646.9, subd. (a)),[1] with a prior conviction of stalking and making a criminal threat (Pen. Code, § 422). He was sentenced to five years in state prison, with a total of 455 days of presentence credit. In this appeal he claims that the trial court erred by denying his motion for substitution of counsel (*People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*), and improperly imposed a one-year concurrent term for a prior prison term. He also challenges the trial court's award of conduct credits. We conclude that the trial court did not conduct a deficient *Marsden* inquiry or erroneously deny the motion for substitution of counsel. We find that the judgment must be modified by striking the sentence for a prior prison term that was not found true by the jury, and increasing defendant's presentence credits by 14 days served in Napa State Hospital after he was found competent to stand trial. In all other respects we affirm the judgment.

[1] All further statutory references are to the Penal Code, unless otherwise indicated.

## STATEMENT OF FACTS AND PROCEDURAL HISTORY[2]

The convictions stem from a series of events that commenced at the victim's place of work and occurred on two consecutive days. On July 13, 2009, defendant came into the Buffalo Exchange store on Haight Street, where the victim Samantha Fuller was working at the cash register. According to Fuller's testimony, defendant wrote her a note that said "F me," and bore her first name as stated on her store identification tag. When Fuller told defendant the note was "inappropriate" and asked him to leave the store, he informed her that he wanted to "marry" her. Defendant looked directly at Fuller, often stared at her, and seemed "serious."

Defendant eventually left the store, but Fuller encountered him again later that night, after the store was closed and she was walking to a bus stop with a coworker. Defendant approached her, gazed at her eyes earnestly, and repeatedly said to her directly and clearly, "I want to cunnilingus your pussy." Fuller was "terrified," and asked defendant to leave, as did her coworker. Defendant quickly returned with a "6-pack of beer in his hand," however, and continued to leer at Fuller, mumbling inaudibly. Fuller felt that defendant was "really intimidating." Fuller's friend stayed with her until the bus came and she went home.

The next evening, defendant reappeared in the Buffalo Exchange store. He began staring at Fuller and again repeating, "I want to cunnilingus your pussy." Fuller and her coworkers directed defendant to "leave the store right now." Fuller also warned defendant that she would call the police if he returned. Before defendant left the store he looked Fuller "straight in the eyes" and said, "Well, if I ever see you on the street I'm going to take your pussy." Fuller testified that defendant was "very serious." She interpreted defendant's statement as a threat of rape. Defendant then stood in front of the store and "proceeded to grab his penis over his clothes," and began "shaking it up and down" as he laughed derisively.

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[2] In light of the issues presented on appeal, which do not deal with the evidence presented at trial, our recitation of the facts that comprise the underlying offenses will be in somewhat summary form. We will focus on presentation of the facts pertinent to the issues raised by defendant, particularly the denials of his sequence of motions for substitution of counsel.

About 10 or 15 minutes later a police officer arrived at the store in response to Fuller's call. Fuller told the officer "what had happened," and gave a description of the suspect. Later that night, the officer provided Fuller with a photo-lineup, and she "instantly recognized" defendant.

Defendant was arrested the following morning in front of the Buffalo Exchange store. In response to subsequent questioning, defendant admitted that he wrote the victim an "obscene note," approached her later that evening on Haight Street, and "had told the victim that he was going to take her pussy." He also stated to the officer that he loved Fuller and wanted to marry her.

Defendant testified at trial that he interacted with Fuller "good-naturedly and kindly," hoping for a "positive, harmless date," and did not intend to frighten her. In response, Fuller became embarrassed, angry and vindictive, then "exaggerated and lied" in her testimony. Defendant apologized to Fuller for "having naively and innocently asked for lovemaking."

On August 5, 2009, defendant was charged with stalking (§ 646.9, subd. (a)), making a criminal threat (§ 422), and second degree burglary (§ 459), with an enhancement allegation of a prior conviction and prison term within the meaning of section 646.9, subdivision (c)(2). In September of 2009, criminal proceedings were suspended pursuant to section 1368, following a finding that defendant was not competent to stand trial. Defendant was treated at Napa State Hospital, and found mentally competent to stand trial on January 7, 2010. He was returned to county jail on February 5, 2010, and proceedings were reinstated. A first amended information was filed on April 22, 2010, to correct the date of the alleged prior conviction and add an allegation of a prior prison term (§ 667.5, subd. (b)).

Defendant made the first of his three motions for substitution of counsel pursuant to *Marsden, supra*, 2 Cal.3d 118, on April 23, 2010, at the conclusion of a hearing on in limine motions. Defendant complained that his attorney failed to meet with him as promised or provide him with copies of documents, and failed to file a motion for a

continuance of the trial. The motion was denied, without prejudice to renewal after defendant obtained his "notes" and met with counsel.

A second or revisited *Marsden* motion was made by defendant on April 26, 2010, again before trial commenced. Defendant repeated his grievances that counsel failed to obtain a continuance in the case, "missed crucial meetings," did not adequately consult with him. Defendant added that he neither trusted nor was "comfortable at all working with this lawyer." He particularly mentioned that counsel was "unjust" and in need of doing "a lot of repenting." Defendant further expressed his fear that evidence of prior convictions would be admitted in the present case. The court again denied the motion, and urged defendant to consult with counsel.

After guilty verdicts had been returned by the jury on counts 1 and 2, at a hearing to order a presentence report on May 14, 2010, defendant reiterated his lack of trust in his appointed counsel, and expressed a desire to work with other lawyers. Defendant protested that his attorney mistakenly believed he "was guilty in this present case" and deserved to be punished, and as a result resisted defendant's "explanations of truth." The court pointed out that defendant was entitled to retain new counsel if he acted quickly, and asked if he was pursing a third *Marsden* motion.

Another *Marsden* hearing ensued. Defendant professed his innocence and asserted that he did not want counsel "involved in anything further" in the case. The court advised defendant that if he wanted to proceed with any motion for a new trial, he needed to cooperate with counsel. Defendant stated that counsel did "not have the heart" to assist him "to point out the truth," as needed to obtain "reversal of the decision" of the jury. He also protested that counsel "worked against" him, resisted his efforts to establish innocence, and called him "a liar" to his "face quite a few times." Defense counsel pointed out to the court that "another lawyer" was necessary to review any new trial motion based on ineffective assistance of counsel, as he had not "seen any issues for a new trial." The court denied the *Marsden* motion.

***I. The Denial of Defendant's Motion for Substitution of Counsel***.

Defendant argues that the trial court erred by failing to conduct an adequate inquiry into the grounds for his request for substitution of counsel after trial.[3] There are two aspects to defendant's assertion of *Marsden* error: first, he was not afforded the opportunity to fully state his reasons for dissatisfaction with counsel before denial of the *Marsden* motion; and second, when counsel subsequently expressed to the trial court that a motion for new trial would require him to "claim ineffective assistance of counsel," the court erred by failing to conduct a further hearing. Defendant maintains that the court's failure to conduct an inquiry makes "meaningful appellate review impossible and results in denial of a fair trial." He asks that we reverse the judgment and remand the case to the trial court to conduct the requisite inquiry into the "allegations concerning counsel's performance."

We will separately review defendant's two claims of *Marsden* error in accordance with the " ' "contours of the rule set forth in *Marsden, supra*, 2 Cal.3d 118," ' " that are " ' "well settled. ' "When a defendant seeks to discharge his appointed counsel and substitute another attorney, and asserts inadequate representation, the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of the attorney's inadequate performance. [Citation.] A defendant is entitled to relief if the record clearly shows that the first appointed attorney is not providing adequate representation [citation] or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result." ' [Citation.]" ' " (*People v. Vines* (2011) 51 Cal.4th 830, 878.) "*Marsden* imposes four requirements" on the trial court: "First, if 'defendant complains about the adequacy of appointed counsel,' the trial court has the duty to 'permit [him or her] to articulate his [or her] causes of dissatisfaction and, if any of them *suggest* ineffective assistance, to *conduct an inquiry* sufficient to ascertain whether counsel is in fact rendering effective assistance.' [Citations.]" (*People v. Mendez* (2008) 161 Cal.App.4th 1362, 1367.)

[3] Defendant discusses but does not challenge the trial court's resolution of his two *Marsden* motions made before trial.

"[W]hen a defendant requests substitute counsel, 'the standard expressed in *Marsden* and its progeny applies equally preconviction and postconviction.' " (*People v. Sanchez* (2011) 53 Cal.4th 80, 88, quoting from *People v. Smith* (1993) 6 Cal.4th 684, 694.) At " 'any stage of the trial' " a criminal defendant " 'must be given the opportunity to state reasons for a request for new counsel.' [Citation.]" (*People v. Lopez* (2008) 168 Cal.App.4th 801, 814.) A defendant is entitled to bring a posttrial *Marsden* motion either for the purpose of sentencing or to bring a new trial motion. (*People v. Miller* (2007) 153 Cal.App.4th 1015, 1024; *People v. Winbush* (1988) 205 Cal.App.3d 987, 991.) In ruling on a postconviction *Marsden* motion, "the trial court must apply the same standard it would apply in ruling on a preconviction *Marsden* motion: substitute counsel should be appointed when, 'in the exercise of its discretion, the court finds that the defendant has shown that a failure to replace the appointed attorney would substantially impair the right to assistance of counsel [citation], or, stated slightly differently, if the record shows that the first appointed attorney is not providing adequate representation or that the defendant and the attorney have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result [citation].' " (*People v. Johnson* (2009) 47 Cal.4th 668, 673, fn. 2, quoting from *People v. Smith, supra,* at p. 696.)

"After hearing from the defendant, a trial court is within its discretion in denying the motion unless the defendant establishes substantial impairment of his right to counsel. [Citation.] On appeal we review the denial for an abuse of discretion." (*People v. Vera* (2004) 122 Cal.App.4th 970, 979.)

***A. The Inquiry into Defendant's Motion for Substitution of Counsel After Trial.***

Defendant acknowledges that the court "conducted a *Marsden* hearing" when he voiced his dissatisfaction with counsel and enumerated the "evidence he felt should have been challenged . . . at trial," but argues that the inquiry undertaken by the court was deficient. He claims the court erred by encouraging defendant to "work with" his attorney on "a new trial motion," and failed to properly grant him the opportunity to articulate "all of the reasons" in support of his request for a "new attorney."

The California Supreme Court has "pointed out that a trial court cannot discharge its duty without hearing the reasons for the defendant's belief that his or her attorney has not afforded adequate representation." (*People v. Martinez* (2009) 47 Cal.4th 399, 417.) *Marsden* "requires that a trial court 'listen[ ] to [a defendant's] reasons for requesting a change of attorneys. [Citation.]' " (*People v. Gutierrez* (2009) 45 Cal.4th 789, 804.) "Accordingly, 'When a defendant moves for substitution of appointed counsel, the court must consider any specific examples of counsel's inadequate representation that the defendant wishes to enumerate." (*People v. Smith, supra,* 6 Cal.4th 684, 690.) "A trial court errs under *Marsden* by not affording a criminal defendant the opportunity to state all his reasons for dissatisfaction with his appointed attorney. [Citations.] On the other hand, a defendant is not entitled to keep repeating and renewing complaints that the court has already heard." (*People v. Vera, supra,* 122 Cal.App.4th 970, 980; see also *People v. Hidalgo* (1978) 22 Cal.3d 826, 827, fn. 1; *People v. Ivans* (1992) 2 Cal.App.4th 1654, 1666.)

Here, defendant voiced his posttrial dissatisfaction with his attorney by complaining that counsel believed in his guilt and failed to accept his explanations of innocence. The court allowed defendant to elaborate on the reasons for his displeasure with counsel. Defendant criticized counsel for failing to offer specific evidence at trial: the testimony of a "handwriting expert" to prove that he did not write the entire note to Fuller; and the testimony of the Buffalo Exchange store manager, who was present and "didn't see anything" when Fuller asserted that defendant "was masturbating" outside the premises.[4] The court urged defendant to "work with" counsel to present any potentially exculpatory evidence in the context of a motion for new trial. Defendant again protested that his attorney believed he "was guilty" and "resisted" his efforts to prove his innocence. The court denied the motion without comment.

We find that the trial court conducted a *Marsden* inquiry appropriate to the nature of the postconviction motion made by defendant. In contrast to *People v. Reed* (2010)

[4] The store manager did not testify at trial for the prosecution.

183 Cal.App.4th 1137, 1144, relied on by defendant, this is not a case in which the court failed "to conduct any inquiry at all into the basis for his motion after he expressed his desire to move for a new trial on the basis of ineffective assistance of counsel." (See also *People v. Mejia* (2008) 159 Cal.App.4th 1081, 1086.) The court afforded defendant an opportunity to state his grounds for dissatisfaction with the current appointed attorney, which included lack of trust in counsel and an interest in presenting evidence to challenge the verdict and support a new trial motion. Defendant was not prevented from stating all of his reasons to support his assertion of inadequate representation or an irreconcilable conflict. (*People v. Sharp* (1994) 29 Cal.App.4th 1772, 1787–1788.)

The court also properly determined that defendant's complaints with counsel's previous performance at trial were subject to evaluation in a new trial motion, and substitution of counsel was not required. Where, as here, the *Marsden* motion is made after trial, "the inquiry is forward-looking in the sense that counsel would be substituted in order to provide effective assistance in the *future*. But the decision must always be based on what has happened in the *past*." (*People v. Smith, supra,* 6 Cal.4th 684, 695.) " 'If the claim is based upon acts or omissions that occurred at trial or the effect of which may be evaluated by what occurred at trial the court may rule on the motion for new trial without substituting new counsel.' [Citation.] The same standard of proof applies to a motion for substitute counsel made in the trial court whether it is made before or after conviction." (*People v. Sharp, supra,* 29 Cal.App.4th 1772, 1787.)

Defendant did not demonstrate that either ineffective assistance of counsel or prejudice occurred at trial. " 'New counsel must be appointed when the defendant presents a colorable claim that he was ineffectively represented at trial; that is, if he credibly establishes to the satisfaction of the court the possibility that trial counsel failed to perform with reasonable diligence and that, as a result, a determination more favorable to the defendant might have resulted in the absence of counsel's failings.' [Citation.]" (*People v. Reed, supra,* 183 Cal.App.4th 1137, 1144–1145, fn. omitted.) Because the *Marsden* motion was made after trial, "the only basis for the motion could be that counsel performed ineffectively during trial or could not adequately represent the defendant at

sentencing." (*People v. Reed, supra,* at p. 1148, citing *People v. Washington* (1994) 27 Cal.App.4th 940, 944.) Defendant's complaints with counsel's failure to present evidence did not credibly establish that appointment of a different attorney would have produced a more favorable verdict, gained defendant a new trial, or could have had any effect on the sentence imposed. (*People v. Washington, supra,* at p. 944.) Defense counsel may have legitimately determined that producing at trial the evidence mentioned by defendant would have been more harmful than helpful to his client's cause. (*People v. Sharp, supra,* 29 Cal.App.4th 1772, 1788.) "We do not find *Marsden* error where complaints of counsel's inadequacy involve tactical disagreements." (*People v. Dickey* (2005) 35 Cal.4th 884, 922.) The conflict between defendant and counsel over the presentation of evidence at trial was a tactical disagreement, in the absence of evidence that indicates otherwise, and did not require substitution of counsel. (*Ibid*.) The facts that support a guilty finding often cannot be trumped by even the most skilled of defense counsel.

Nor did defendant's statement of grievances reveal such an irreconcilable conflict that ineffective representation was likely to result. "The mere ' "lack of trust in, or inability to get along with," ' counsel is not sufficient grounds for substitution. [Citation.]" (*People v. Taylor* (2010) 48 Cal.4th 574, 600.) Without a showing in the record of irreconcilable conflict or substantial impairment of defendant's right to counsel, the *Marsden* motion after trial was properly denied.

***B. Substitution of Counsel Associated with a Motion for New Trial.***

The second facet of defendant's claim of *Marsden* error focuses on his attorney's pronouncement, following denial of the *Marsden* motion, that he did not perceive "any issues for a new trial motion," and would be forced to "claim ineffective assistance of counsel."[5] We are not persuaded that counsel's recognition and pronouncement of a *potential* conflict if a new trial motion was filed based on a claim of ineffective representation merited an additional *Marsden* inquiry under the circumstances. From the

[5] Counsel also advised the court that if ineffective assistance of counsel was claimed as part of a new trial motion, another attorney would be necessary to review the matter "at some point."

prior inquiry, the court was aware of defendant's specified causes of dissatisfaction with his attorney, sufficient to ascertain whether counsel was in fact rendering effective assistance. Being alerted to a speculative future conflict of interest in the event a new trial motion was filed did not provide the trial court with a reason to immediately engage in another postconviction *Marsden* inquiry. Thereafter, defendant did not file a motion for new trial or renew his request for substitution of counsel. No *Marsden* error occurred.

***II. The Imposition of the One-year Term for the Prior Prison Term***.

Defendant challenges the trial court's imposition of a one-year sentence for a prior term of imprisonment pursuant to section 667.5, subdivision (b). Although the jury found the prior prison term allegation "*Not True*," the clerk's minutes stated incorrectly that the "667.5(b) allegation was found to be *true*." (Italics added.) The trial court subsequently imposed and stayed a one-year enhancement under section 667.5, subdivision (b).

The Attorney General agrees that the sentence imposed on the section 667.5, subdivision (b) enhancement cannot stand. The clerk's minutes does not accurately reflect the jury's finding. The abstract of judgment must be corrected to conform to the not true finding of the jury. (*People v. Zackery* (2007) 147 Cal.App.4th 380, 386.) The unauthorized one-year sentence on the prior prison term enhancement must be stricken on appeal. (*People v. Flores* (2005) 129 Cal.App.4th 174, 187; *People v. Rivas* (2004) 119 Cal.App.4th 565, 571; *People v. Breazell* (2002) 104 Cal.App.4th 298, 305; *People v. Bradley* (1998) 64 Cal.App.4th 386, 390–391.)

***III. The Award of Conduct Credit After Defendant Was Found Competent***.

Defendant also claims that he is entitled to an additional award of conduct credits under section 4019 for time served in Napa State Hospital between January 7, 2010, "when he was found competent to stand trial," and February 3, 2010, when he was certified as competent and finally returned to county jail two days later. The trial court awarded defendant a total of 455 days of conduct credit that did not include the time he was waiting for issuance of the section 1372, subdivision (a)(1) certification of competence. Defendant contends that equal protection principles demand an award to

him of an additional 14 days of conduct credit for his time served after a finding of competence but before the certification was issued to return him to county jail.

Defendant is correct, as the Attorney General concedes. In *People v. Bryant* (2009) 174 Cal.App.4th 175, 182 (*Bryant*), the court concluded that while "an accused awaiting trial is not statutorily entitled to conduct credits for time spent in a state hospital while subject to a finding of incompetency," the doctrine of "equal protection requires application of section 4019 credits to presentence confinement in a state facility if the circumstances of the confinement are essentially penal." In light of the express mandatory directive in section 1372, subdivision (a)(1) that once the accused has regained competency, the medical director of the state hospital or a designee must immediately certify that fact by filing a certificate of restoration with the committing court, the court declared: "[E]qual protection principles warrant defendant be given conduct credits that would have been earned had he been returned to the county jail if a timely restoration certificate had been issued." (*Bryant, supra,* at p. 184.) Thus, "when the uncontradicted evidence demonstrates the accused's competency was unquestionably regained as of a date certain, as occurred here on May 21, 2007, the defendant is entitled to section 4019 conduct credits even though the section 1372, subdivision (a)(1) certification has not been mailed to the trial court." (*Ibid*.)

Here, as in *Bryant*, nothing in the record suggests that the finding of competence was disputed. Defendant is entitled to 14 additional days of conduct credit for the time spent in Napa State Hospital awaiting issuance of the certificate of restoration of competence.

***IV. Additional Conduct Credits Under the Amended Version of Section 4019.***

In a supplemental brief defendant presents another equal protection argument. He argues that he is entitled to an award of additional presentence conduct credits under the most recent amended version of section 4019. In 2011 section 4019 was amended to grant presentence conduct credits in accordance with a more favorable formula to enumerated classes of prisoners who were previously denied those credits under prior versions of the statute. Defendant contends that the 2011 amendments to the statute

should be applied to the entire period of his presentence custody, entitling him to additional conduct credits for the time served prior to October 1, 2011. Defendant requests that we order the trial court to amend the abstract of judgment to reflect "281 days" of conduct credit, "for a total of 610 presentence credit days."

A defendant "sentenced to prison for criminal conduct is entitled to credit against his [or her] term for all actual days of [presentence] confinement solely attributable to the same conduct." (*People v. Buckhalter* (2001) 26 Cal.4th 20, 30.) That confinement or custody includes days spent in jail before sentencing. (§ 2900.5, subd. (a).) Pursuant to section 4019, a defendant may also earn credit for "good behavior" and satisfactory performance of any labor assigned him or her during presentence custody. (§ 4019, subds. (b), (c); *People v. Dieck* (2009) 46 Cal.4th 934, 939.) A defendant's good conduct time is deducted from his or her period of confinement. (§ 4019, subds. (b) & (c).) Before January 25, 2010, section 4019 provided that if a defendant earned all available presentence conduct credits, six days would be deemed to have been served for every four days spent in actual custody. (Former § 4019, subd. (f); Stats. 1982, ch. 1234, § 7, pp. 4553–4554.)

Effective January 25, 2010, the Legislature amended section 4019 to increase the number of presentence conduct credits available to eligible defendants. (Stats. 2009 (2009–2010 3d Ex. Sess.) ch. 28, § 50.) Under the amended version of the law, a defendant earned credits at twice the previous rate, that is, four days of presentence credit for every two days of custody. (Former § 4019, subd. (f); Stats. 2009, ch. 28, § 50.) However, defendants who were required to register as sex offenders, who were incarcerated for commission of a serious felony, or who had suffered a prior conviction for a serious or violent felony, as defined in sections 667.5 and 1192.7, were ineligible for the enhanced credits and continued to accrue credits at the previously applicable rate. (Former § 4019, subds. (b)(2) & (c)(2).)

The Legislature again amended section 4019 in 2010 and 2011. (See Stats. 2010, ch. 426, § 2; Stats. 2011, ch. 15, § 482; Stats. 2011–2012 (1st Ex. Sess.) ch. 12, § 35.) The most recent 2011 amendments of section 4019, as operative October 1, 2011, to add

subdivision (a)(6), provide that the formula of four days of presentence credit for every two days of custody applies, "When a prisoner is confined in a county jail, industrial farm, or road camp, or a city jail, industrial farm, or road camp as a result of a sentence imposed pursuant to subdivision (h) of Section 1170." Thus was removed the previous exclusion of classes of prisoners, including defendant, who must register as sex offenders, were committed for commission of a serious felony, or who had suffered a prior conviction for a serious or violent felony, as defined in sections 667.5 and 1192.7, from the benefits of the increase in the formula for awarding presentence conduct credits.

According to subdivision (h) of the most current version of section 4019, however, 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." Defendant committed the current offenses well before the operative date of the amended statute, but argues that "equal protection compels an award of additional presentence credits in the present case."

" 'Guarantees of equal protection embodied in the Fourteenth Amendment of the United States Constitution and article I, section 7 of the California Constitution prohibit the state from arbitrarily discriminating among persons subject to its jurisdiction. . . .' [Citation.]" (*People v. Chavez* (2004) 116 Cal.App.4th 1, 4.) "The constitutional guarantee of equal protection of the laws has been defined to mean that all persons under similar circumstances are given ' "equal protection and security in the enjoyment of personal and civil rights . . . and the prevention and redress of wrongs. . . ." ' [Citation.] The concept ' " 'compels recognition of the proposition that persons similarly situated with respect to the legitimate purpose of the law receive like treatment.' " ' [Citation.]" (*Pederson v. Superior Court* (2003) 105 Cal.App.4th 931, 939.) " 'Under the equal protection clause, "[a] classification 'must be reasonable, not arbitrary, and must rest upon some grounds of difference having a fair and substantial relation to the object of the

legislation, so that all persons similarly circumstanced shall be treated alike.' " ' [Citations.]" (*People v. Wilder* (1995) 33 Cal.App.4th 90, 104.)

" 'The equality guaranteed by the equal protection clauses of the federal and state Constitutions is equality under the same conditions, and among persons similarly situated. The Legislature may make reasonable classifications of persons and other activities, provided the classifications are based upon some legitimate object to be accomplished.' [Citation.]" (*People v. Spears* (1995) 40 Cal.App.4th 1683, 1687.) " '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.] . . . [Citation.]' " (*People v. Dial* (2004) 123 Cal.App.4th 1116, 1120; see also *People v. Calhoun* (2004) 118 Cal.App.4th 519, 529.) "The 'similarly situated' prerequisite simply means that an equal protection claim cannot succeed, and does not require further analysis, unless there is some showing that the two groups are sufficiently similar with respect to the purpose of the law in question that some level of scrutiny is required in order to determine whether the distinction is justified." (*People v. Nguyen* (1997) 54 Cal.App.4th 705, 714.) "Persons who are similarly situated must be treated alike. [Citation.] There is, however, no requirement that persons in different circumstances must be treated as if their situations were similar." (*People v. McCain* (1995) 36 Cal.App.4th 817, 819.) "The analysis will not proceed beyond this stage if the groups at issue are not ' "similarly situated with respect to the legitimate purpose of the law," ' or if they are similarly situated, but receive ' "like treatment." ' Identical treatment is not required. [Citations.]" (*In re Jose Z.* (2004) 116 Cal.App.4th 953, 960.)

The distinction created by the amended version of section 4019 at issue here is a straightforward one: those defendants who committed the same offenses or earned conduct credits before the operative date of the statute are treated more harshly than those who committed the same crimes or earned their credits on or after October 1, 2011. Abstractly speaking, the two groups are similarly situated in the sense that they committed the same offenses, but are treated differently in terms of earning conduct

credits based entirely on the dates their crimes were committed and their credits were earned. In terms of receiving additional conduct credit, nothing distinguishes the status of a prisoner whose crime was committed after October 1, 2011, from one whose crime was committed before that date. This satisfied the first prerequisite for a meritorious claim under the equal protection clause, a classification that affects two similarly situated groups in an unequal manner. (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253.)

We proceed to judicial scrutiny of the classification. (*People v. Buffington* (1999) 74 Cal.App.4th 1149, 1155.) Legislation that creates sentencing disparity or alters the treatment of custody credits for inmates does not affect a fundamental right, and thus satisfies the requirements of equal protection "if it bears a rational relationship to a legitimate state purpose." (*People v. Richter* (2005) 128 Cal.App.4th 575, 584; see also *People v. Wilkinson* (2004) 33 Cal.4th 821, 840; *People v. Silva* (1994) 27 Cal.App.4th 1160, 1168–1169.) " ' " '[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; see also *People v. Gonzales* (2001) 87 Cal.App.4th 1, 12–13.)

We look to the purposes of the 2011 amendments to section 4019 to evaluate the rational basis for the legislative classification. The presentence custody credit scheme of section 4019 is generally focused on encouraging " 'minimal cooperation and good behavior by persons temporarily detained in local custody before they are convicted, sentenced, and committed on felony charges. . . .' [Citation.]" (*People v. Brown* (2004) 33 Cal.4th 382, 405.) The 2011 amendments to section 4019 were enacted for a decidedly different purpose: as part of legislation to address the state's fiscal emergency by effectuating an earlier release of a defined class of prisoners, thereby relieving the state of the cost of their continued incarceration and alleviating overcrowding in county jail facilities. (See Assem. Bill No. 17X (2011–2012 1st Ex. Sess.) Stats. 2011–2012, 1st Ex. Sess. 2011, ch. 12X, § 35; p. 76; Legis. Counsel's Dig., Assem. Bill No. 109 (2011

Reg. Sess.) ___ Stats. 2011, Summary Dig., p. 17; Legis Counsel Dig., Assem. Bill No. 109 (2011 Reg. Sess.) ___ Stats. 2011, Summary Dig., p. 19.) While defendant proposes that "there is no rational basis" for precluding a retroactive application of the more generous formula of conduct credits to some prisoners, based only on the dates their crimes were committed or credits were earned, we perceive a legitimate reason for limiting the extension of credits. The Legislature may have decided that the nature and scope of the fiscal emergency required granting additional credits to the specified classes of prisoners previously denied them – those who must register as sex offenders, or committed serious felonies, or had suffered a prior conviction for a serious or violent felony – only after the effective date of the amendments. That basis for the legislation is substantiated by the explicit articulation in subdivision (h) of section 4019 of a prospective application of the statutory amendments. Reducing prison populations by granting a prospective-only increase in conduct credits strikes a proper, rational balance between the state's fiscal concerns and its public safety interests.

" 'The decision of how long a particular term of punishment should be is left properly to the Legislature. The Legislature is responsible for determining which class of crimes deserves certain punishments and which crimes should be distinguished from others. As long as the Legislature acts rationally, such determinations should not be disturbed.' [Citation.]" (*People v. Wilkinson*, *supra*, 33 Cal.4th 821, 840, quoting from *People v. Flores* (1986) 178 Cal.App.3d 74, 88.) " ' "Where . . . there are plausible reasons for [the Legislature's] action, our inquiry is at an end." [Citation.]' [Citation.]" (*People v. Malfavon* (2002) 102 Cal.App.4th 727, 739.) The California Supreme Court declared in *People v. Floyd* (2003) 31 Cal.4th 179, 188: "Defendant has not cited a single case, in this state or any other, that recognizes an equal protection violation arising from the timing of the effective date of a statute lessening the punishment for a particular offense. Numerous courts, however, have rejected such a claim—including this court. (*Baker v. Superior Court* (1984) 35 Cal.3d 663, 668 [200 Cal.Rptr. 293, 677 P.2d 219] [' "A refusal to apply a statute retroactively does not violate the Fourteenth Amendment" '], quoting *People v. Aranda* (1965) 63 Cal.2d 518, 532 [47 Cal.Rptr. 353,

407 P.2d 265].) 'The Legislature properly may specify that such statutes are prospective only, to assure that penal laws will maintain their desired deterrent effect by carrying out the original prescribed punishment as written.' [Citations.]"

We conclude that a rational basis exists for the timing and prospective application of the effective date of the 2011 amendments to section 4019, which lessened punishment by expanding the class of prisoners who receive increased conduct credits. The prospective application of the statute does not violate equal protection principles.

**DISPOSITION**

The judgment is amended to strike the one-year sentence for the prior prison term and award defendant an additional 14 days of presentence credits under section 4019. As so amended the judgment is affirmed. The trial court is directed to prepare and forward an amended abstract of judgment reflecting the modifications to the Department of Corrections and Rehabilitation.

_____
Dondero, J.

We concur:

_____
Marchiano, P. J.

_____
Margulies, J.

Filed 4-18-12

**CERTIFIED FOR PARTIAL PUBLICATION***

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES BORG,

Defendant and Appellant.

A129258
(San Francisco County
Super. Ct. No. 209487)

**ORDER CERTIFYING OPINION FOR PARTIAL PUBLICATION**

**BY THE COURT:**

The opinion previously filed on April 2, 2012, was not certified for publication. After the court's review of a request pursuant to rule 8.1120(b) of the California Rules of Court, and good cause established under rule 8.1105, the opinion is certified for partial* publication. It is hereby ordered that the opinion be published in the Official Reports.

Dated: April 18, 2012

_____
Marchiano, P.J.

* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of parts I, II, and III.

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| Trial Court: | San Francisco County Superior Court |
| Trial Judge: | Hon. Ronald E. Albers |
| For Defendant and Appellant: | Carol A. Navone, Esq.<br>Under appointment by the Court of Appeal |
| For Plaintiff and Respondent: | Kamala D. Harris, Attorney General<br>Dane R. Gillette, Chief Assistant Attorney General<br>Gerald A. Engler, Assistant Attorney General<br>Rene A. Chacon, Supervising Deputy Attorney General<br>Julia Y. Je, Deputy Attorney General |