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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. GERALD JOHN EUSEBIO, Defendant and Appellant.	B216149 (Los Angeles County Super. Ct. No. VA107591)

APPEAL from a judgment of the Superior Court of Los Angeles County, John A. Torribio, Judge. Modified and affirmed.

Charles R. Khoury, Jr., under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Keith H. Borjon and Sharlene A. Honnaka, Deputy Attorneys General, for Plaintiff and Respondent.

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*Pursuant to California Rules of Court, rule 8.1100 and 8.1110, this opinion is certified for partial publication with the exception of the factual and procedural summary and section 1 of the discussion.

In the published portion of this opinion, we decide that an amendment to Penal Code section 4019[1] concerning conduct credit for county jail inmates is not to be applied retroactively and that prospective application does not violate appellant's right to equal protection under the California Constitution. In the unpublished portion of the opinion, we conclude that section 654 precludes punishment of appellant Gerald J. Eusebio for both passing a forged check and false personation where there was no temporal separation in the commission of the crimes and that the false personation offense was committed to facilitate the passing of the forged check under the instructions given the jury.

FACTUAL AND PROCEDURAL SUMMARY

Appellant Gerald J. Eusebio was charged with multiple offenses arising from forging or altering checks and then cashing them at commercial banks. Since his only challenge is to the sentence imposed on count 6, false personation, we confine our factual summary to the circumstances of that charge and the related charge in count 7.

In 2008, Nicholas Weber made out check No. 995 on his checking account with Washington Mutual Bank (Exh. 5). It was payable to the ACLU in the amount of $10. He placed the check in the mailbox just outside his house. When shown the check at trial, Weber said the check was his, but that the amount and the "person on here" was not. The payee had been altered to "Ariel Francisco" and the amount raised to $400. Weber did not give appellant permission to cash that check.

Ariel Francisco testified that he lived with appellant for some months in the first quarter of 2008. Early that year his California driver's license and other cards were stolen. He identified his name on exhibit 5, but said he had never received a check from Nicholas Weber, whom he did not know. He denied cashing the check on April 19, 2008. He did not give appellant permission to use his identity or to impersonate him.

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[1] All statutory references are to the Penal Code.

Norine Jarrett, a fraud investigator for Washington Mutual Bank, identified exhibit 5 as a check she pulled from bank records, which indicated it was cashed on April 19, 2008 in Los Angeles County. Dominique Enriquez, a fingerprint expert for the Los Angeles County Sheriff's Department, compared a fingerprint on exhibit 5 with appellant's fingerprint and concluded that they matched. Appellant told Detective Brett Zour that he had used Ariel Francisco's identification to cash a check, but could not remember the details.

Based on the alteration and cashing of exhibit 5, appellant was charged and convicted of one count of forgery (count 6, § 470, subd. (d)) and one count of false personation of Ariel Francisco (count 7, § 529)). The court selected a three-year term on count 2, an unrelated crime, as the base term. One-third the midterm (8 months) was imposed for each of counts 6 and 7, to be served consecutively. Together with the sentences on the other unrelated counts, the total term of imprisonment was seven years. This timely appeal followed.

DISCUSSION

I

Application of the multiple punishment provision of section 654 often presents intricate issues. One of these is whether and when a temporal break in the commission of two crimes sharing the same overall objective—theft—may both be punished. Courts have drawn a distinction between multiple crimes committed in close proximity for one objective and crimes committed with a significant temporal break, and that circumstance appears to apply to the facts of this case. Nevertheless, because of the way the case was pleaded and the jury instructed, we conclude that section 654 bars the multiple punishment imposed.

"An accusatory pleading may charge different statements of the same offense. (§ 954.) As a general rule, 'a person may be *convicted* of, although not *punished* for, more than one crime arising out of the same act or course of conduct. "In California, a single act or course of conduct by a defendant can lead to convictions 'of *any number* of

the offenses charged.' [Citations.]" [Citation.]' (*People v. Reed* (2006) 38 Cal.4th 1224, 1226-1227.)" (*People v. Mitchell* (2008) 164 Cal.App.4th 442, 460.) But section 654 prohibits multiple punishment under certain circumstances. It provides in relevant part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." (§ 654, subd. (a).)

Appellant argues the false personation of Ariel Francisco (count 7) was merely the method used to accomplish the forgery (count 6). He cites cases precluding multiple punishment for burglary and conspiracy to commit grand theft (*In re Romano* (1966) 64 Cal.2d 826), for forgery and grand theft (*People v. Kagan* (1968) 264 Cal.App.2d 648), and for issuing worthless checks and grand theft (*People v. Caruth* (1965) 237 Cal.App.2d 401; *People v. Martin* (1962) 208 Cal.App.2d 867). Appellant argues the single intent and objective in these cases was to steal money, as it was here.

Respondent argues the crime of forgery was complete when appellant knowingly passed an altered check that he intended to be accepted as genuine, with the intent to defraud. The contention is that "the forgery count did not require any subsequent acts by appellant to convince the bank to give him money, such as presentation of identification." According to respondent, appellant's intent in presenting Ariel Francisco's stolen identification "was not to complete the crime of forgery, which had already been completed, but to illegally obtain money from the bank by presenting both the altered check (count six) and Francisco's stolen identification (count seven)." At oral argument, it appeared that respondent was arguing that false personation required appellant to act with the intent of making Francisco liable. If so, appellant would have one intent as to Mr. Weber, and a separate intent as to Francisco. The California Supreme Court concluded that section 529, paragraph 3 is "reasonably susceptible of only one interpretation: that the Legislature sought to deter and to punish all acts by an impersonator that might result in a liability or a benefit, whether or not such a

consequence was intended or even foreseen." (*People v. Rathert* (2000) 24 Cal.4th 200, 206, italics added.)

Section 470, subdivision (d) provides: "Every person who, with the intent to defraud, falsely makes, alters, forges, or counterfeits, utters, publishes, passes or attempts or offers to pass, as true and genuine, any of the following items, knowing the same to be false, altered, forged, or counterfeited, is guilty of forgery: any check, . . ." Under this statute, forgery has three elements: a writing, the false making of the writing, and an intent to defraud. (*People v. Gaul-Alexander* (1995) 32 Cal.App.4th 735, 741.) "The false writing must be something which will have the effect of defrauding one who acts upon it as genuine." (*Id.* at p. 742.)

"'The crime of forgery as denounced by statute [§ 470] consists of either of two distinct acts—the fraudulent making of an instrument, such as a false writing thereof, or the uttering of a spurious instrument by passing the same as genuine with knowledge of its falsity [citation]; and although both acts may be alleged in the conjunctive in the same count in the language of the statute, the offense does not require the commission of both—it is complete when one *either* falsely makes a document without authority *or* passes such a document with intent to defraud [citations], and the performance of one or both of these acts with reference to the same instrument constitutes but a single offense of forgery. [Citation.]' (*People v. Luizzi* (1960) 187 Cal.App.2d 639, 644.)" (*People v. Kenefick* (2009) 170 Cal.App.4th 114, 123, italics added.) Here, the jury was instructed only on the act of passing the altered check with the intent to defraud.[2]

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[2] In pertinent part, the instruction on count 6, forgery, read as follows: "The defendant is charged in Count 2, 4, and 6 with forgery committed by *passing* a forged document in violation of [section 470(d)]. [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant *passed* an altered check; [¶] 2. The defendant knew that the check was altered; [¶] AND [¶] 3. When the defendant *passed* the check he intended that it be accepted as genuine and he intended to defraud. [¶] . . . [¶] A person *passes* a document if he or she represents to someone that the document is genuine. The representation may be made by words or conduct and may be either direct or indirect." (CALCRIM No. 1905, italics added.)

Section 529, paragraph 3 defines false personation: "Every person who falsely personates another . . . , and in such assumed character either: 'Does any other act whereby, if done by the person falsely personated, he might, in any event, become liable to any suit or prosecution, or to pay any sum of money, or to incur any charge, forfeiture, or penalty, or whereby any benefit might accrue to the party personating, or to any other person." The statute was intended to "deter and to punish all acts by an impersonator that might result in a liability or a benefit, whether or not such a consequence was intended or even foreseen." (*People v. Rathert, supra,* 24 Cal.4th at p. 206.)

The seminal case on application of section 654 is *Neal v. State of California* (1960) 55 Cal.2d 11 (*Neal*). In *Neal*, the petitioner threw gasoline into the bedroom of the victims and ignited it. The victims were severely burned. Petitioner was convicted of two counts of attempted murder and one count of arson. The Supreme Court explained: "'Section 654 has been applied not only where there was but one "act" in the ordinary sense . . . but also where a course of conduct violated more than one statute and the problem was whether it comprised a divisible transaction which could be punished under more than one statute within the meaning of section 654.' [Citation.]" (*Id*. at p. 19, quoting *People v. Brown* (1958) 49 Cal.2d 577, 591.) Under the well-established test formulated by the court in *Neal* "[w]hether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one." (*Ibid.*)

The court concluded "the arson was the means of perpetrating the crime of attempted murder just as the malicious use of explosives was the means for perpetrating the attempted murder in *People v. Kynette* [(1940) 15 Cal.2d 731], and the assault with the baseball bat was the means of committing robbery in *People v. Logan* [(1953) 41 Cal.2d 279]. *The conviction for both arson and attempted murder violated* [*section 654*], *since the arson was merely incidental to the primary objective of killing* Mr. and Mrs.

Raymond. Petitioner, therefore, can only be punished for the more serious offense, which is attempted murder." (*Neal, supra*, 55 Cal.2d at p. 20, italics added.)

But the analysis of the two attempted murder convictions presented a different problem. The *Neal* court observed that the purpose of the prohibition against multiple punishment is "to insure that the defendant's punishment will be commensurate with his criminal liability." (*Neal, supra*, 55 Cal.2d at p. 20.) It held that a defendant who commits an act with an intent to harm more than one person, or by means likely to harm several persons, is more culpable than a defendant who harms only a single person. (*Ibid.*) It cited the well-established principle that section 654 "is not '. . . applicable where . . . one act has two results each of which is an act of violence against the person of a separate individual.' [Citations.]" (*Id*. at pp. 20-21.) It concluded that the two consecutive attempted murder convictions were properly imposed. (*Id*. at p. 21.)

The Supreme Court revisited the application of section 654 several years later in *People v. Bauer* (1969) 1 Cal.3d 368. In that case, three elderly women were victims of a home invasion robbery. They were bound, their home was ransacked, and the defendant and his accomplice fled in a car belonging to one of the victims. Items belonging to each of the three victims were missing from the house. Defendant was found guilty of burglary, robbery, grand theft, and automobile theft. He was given concurrent sentences of imprisonment for robbery and auto theft, but was not sentenced on the burglary and grand theft counts.

The *Bauer* court rejected the respondent's argument that separate sentences for car theft and robbery were permissible on the theory that the robbery was complete before the car theft began. The court explained: "The fact that one crime is technically complete before the other commenced does not permit multiple punishment where there is a course of conduct comprising an indivisible transaction." (*People v. Bauer, supra*, 1 Cal.3d at p. 377.) Under *Bauer*, respondent's argument here that the crime of forgery was completed before the commission of the offense of false personation, is not dispositive. The issue is not when the offenses were completed, but whether they constituted a course of conduct comprising "an indivisible transaction."

In *People v. Harrison* (1989) 48 Cal.3d 321, the Supreme Court considered the application of section 654 to sex crimes committed in a single attack. Defendant attacked the victim in her bedroom, and during a seven-to-ten minute continuous attack, digitally penetrated her three times as she struggled to free herself. The court rejected his argument that sentence on two of the convictions for the penetrations should have been stayed under section 654. The *Harrison* court provided guidance for determining whether the defendant had a single intent: "'It is defendant's intent and objective, not the temporal proximity of his offenses, which determine whether the transaction is indivisible. [Citations.] [I]f all of the offenses were merely *incidental to*, or were the *means of accomplishing or facilitating one objective*, defendant may be found to have harbored a single intent and therefore may be punished only once. (*Neal v. State of California, supra*, 55 Cal.2d 11, 19.)'" (*Id.* at p. 335, italics added.)

The Supreme Court drew this test from the *Neal* court's review of earlier section 654 cases, such as *People v. Slobodion* (1948) 31 Cal.2d 555, in which convictions for sex perversion and lewd and lascivious conduct were sustained even though both acts were closely connected in time and a part of the same criminal venture. The court in *Neal* characterized the act giving rise to the lewd and lascivious conduct charge in *Slobodion* as separate and distinct and "not incidental to or the means by which the act of sex perversion was accomplished." (*Neal, supra*, 55 Cal.2d at p. 20.)

The Supreme Court in *Harrison* cited its decision in *People v. Beamon* (1973) 8 Cal.3d 625, overruled on another ground in *People v. Mendoza* (2000) 23 Cal.4th 896, 908, in recognizing that a defendant who harbors "'multiple criminal objectives'" *independent of, and not merely incidental to each other*, may be punished for each statutory violation committed "'even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.'" (*People v. Harrison, supra*, 48 Cal.3d at p. 335, quoting *People v. Beamon*, *supra*, 8 Cal.3d at p. 639, italics added.)

The principle that multiple acts which are incidental to, or the means of, facilitating or achieving a single objective, may be punished only once was applied in

People v. Kenefick, *supra*, 170 Cal.App.4th 114 (*Kenefick*).[3] In that case, the defendant stole $890,000 from six victims while purporting to run an investment company which was actually a Ponzi scheme. She was convicted of 18 counts of theft, burglary, selling securities by false statement, and forgery. The court held that multiple forged signatures on a single document constituted only one count of forgery. It also stayed the sentence on the remaining forgery counts on the ground they were a part of a single course of action with a single intent.

The defendant in *Kenefick* argued she should not be punished separately for forgery in two of the counts because they were part and parcel of the theft, securities fraud and burglary committed with the single intent of taking victim Howard's money. Mr. Howard invested with defendant and, as security, received two promissory notes, each bearing the forged signatures of a husband and wife; the signatures of a different couple appearing on each document. The *Kenefick* court applied the principles of *Neal*, *supra*, 55 Cal.2d 11, *People v. Beamon*, *supra*, 8 Cal.3d 625, and *People v. Harrison*, *supra*, 48 Cal.3d 321, and relied in part on *People v. Curtin* (1994) 22 Cal.App.4th 528, 532 in which the respondent conceded that sentence on a forgery count should be stayed under section 654 because the forgery and burglary (entering a bank) were part of an indivisible transaction, committed with a single criminal intent of cashing the check. (*Kenefick*, *supra*, 170 Cal.App.4th at p. 125.) It concluded that the forgery counts in the case before it should be stayed because "the forgeries were preliminary steps in the plan to steal Howard's money." (*Ibid.*)

Here, as in *Kenefick*, appellant forged the check and obtained Francisco's false identity for the single objective of taking money from Weber's account while concealing his own identity. Stealing Francisco's identification was a preliminary act committed to facilitate the passing of the forged check. Under this analysis, punishment for both the forgery and false personation would be improper under section 654.

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3 Because the parties did not cite *Kenefick* in their briefs, we invited them to address its applicability to this case, which they have done.

An alternative section 654 analysis leads to the same result. Although the "well-established" principle is that section 654 does not apply where one act has two results, each of which is an act of violence against a separate victim (*Neal, supra,* 55 Cal.2d at pp. 20-21), that rule does not apply here where the offenses were not violent crimes. In *People v. Bauer*, *supra*, 1 Cal.3d 368, the court rejected the respondent's argument that the multiple victims in that case warranted punishment for car theft in addition to robbery. The *Bauer* court reasoned: "Where, however, the offenses arising out of the same transaction *are not crimes of violence, but involve crimes against property interests of several persons*, this court has recognized that only single punishment is permissible." (*Id*. at p. 378, italics added.) It precluded punishment for automobile theft under the proscription against double punishment in section 654. (*Ibid.*) Here, although there were two victims, the offenses were property crimes rather than crimes of violence and do not come within this exception to section 654.

A different analysis based on the timing of the offenses, which was adopted by the court in *People v. Kwok* (1998) 63 Cal.App.4th 1236 (*Kwok*), is dispositive here. In that case, the defendant, an acquaintance of the victim, entered her residence, took the lock out of a door, and had a key made to it, which would give him access to her home. Nine days later, he again entered her home without permission and assaulted her. The defendant claimed his sentence for the first burglary should be stayed under section 654 because it was part of an indivisible course of conduct which culminated in the second burglary and the assault nine days later.

The *Kwok* court cited footnote 11 of *Beamon* which states: "It seems clear that a course of conduct *divisible in time*, although directed to one objective, may give rise to multiple violations and punishment." (*Kwok, supra,* 63 Cal.App.4th at p. 1253, quoting *Beamon*, *supra,* 8 Cal.3d at p. 639, fn. 11.) It concluded: "Thus, a finding that multiple offenses were aimed at one intent and objective does not necessarily mean that they constituted 'one indivisible course of conduct' for purposes of section 654. If the offenses were committed on different occasions, they may be punished separately." (*Ibid.*) The Court of Appeal in *Kwok* cited *People v. Williams* (1988) 201 Cal.App.3d

439. Relying on *People v. Beamon*, *supra*, 8 Cal.3d at page 639, footnote 11, the *Williams* court concluded that the defendant's "crimes were divisible in time because the burglary was committed several months before the murders were solicited, and therefore imposition of a separate sentence for the burglary was permissible. (201 Cal.App.3d at p. 442.)" (*Kwok, supra*, 63 Cal.App.4th at pp. 1253-1254.)

The Court of Appeal in *Kwok* concluded that multiple punishment was not precluded by section 654 because defendant's acts constituted a "'course of conduct divisible in time'" and because each entry created a separate and distinct risk of violent confrontation. It also determined that the defendant's objectives were independent and not merely incidental because obtaining the key in the first burglary was not a necessary or integral part of the subsequent offenses. (*Kwok, supra*, 63 Cal.App.4th at pp. 1256-1257; see also *People v. Gaio* (2000) 81 Cal.App.4th 919 [defendant properly punished for several acts of bribery where offenses were temporally separated so as to afford defendant opportunity to reflect and renew his intent before committing the next offense]; *People v. Andra* (2007) 156 Cal.App.4th 638, 642 [defendant properly punished for both obtaining money by false pretenses and identity theft when she opened bank accounts in name of another, deposited fraudulent and stolen checks, and withdrew funds, in light of temporal separation between these crimes, defendant had substantial opportunity to "'reflect' on her conduct and then 'renew' her intent to commit yet another crime"].)

Under the *Kwok* line of authority, if the prosecution's theory had been that the forgery was completed when the check was altered, appellant had an opportunity to reflect between that act and the cashing of the check with the false identification. Under those circumstances, imposition of punishment on both the forgery and false personation charges would have been proper. But the manner in which the jury was instructed precludes application of the *Kwok* analysis. The instruction on forgery was based only on the passing, rather than the making, of the altered check. The passing of the altered check was simultaneous with the false personation by use of the stolen identification. This was the only theory on which the case was presented and received by the jury. There is no evidence the crimes were divisible and therefore subject to punishment for

each under section 654. The trial court erred in imposing punishment for both counts 6 and 7. Accordingly, we strike the punishment on count 6, which bears the lesser penalty.

II

Appellant was convicted of offenses arising from forging or altering checks and cashing them at commercial banks, using stolen identification. He requested and we granted permission for supplemental briefing on the retroactive application of new legislation on conduct credits. Counsel have submitted and we have reviewed their memoranda. The legislation which, among other things, amended section 4019 on conduct credit, was enacted in October 2009, and became effective January 25, 2010.

Former subdivisions (b) and (c) of section 4019 provided that "for each six-day period in which a prisoner is confined in or committed to" a local jail facility, one day is deducted from the period of confinement for performing assigned labor and one day is deducted from the period of confinement for satisfactorily complying with the rules and regulations of the facility. (Stats. 1982, ch. 1234, § 7, p. 4553.) Former subdivision (f) provided that "if all days are earned under this section, a term of six days will be deemed to have been served for every four days spent in actual custody."

The Legislature passed Senate Bill No. 18 in October 2009, at an extraordinary session called to address the fiscal crisis (2009-2010 3d Ex. Sess.). Among other things, Senate Bill No. 18 amended section 4019 to provide for the accrual of presentence credits at twice the previous rate for all prisoners except those required to register as a sex offender, committed for a serious felony (as defined in section 1192.7), or who have a prior conviction for a serious or violent felony. (§ 4019, subd. (b)(2); see also *id.*, subd. (c)(2); Stats. 2009, 3d Ex. Sess., ch. 28, § 50.) Subdivisions (b)(1) and (c)(1) of section 4019 now provide that one day of work credit and one day of conduct credit may be deducted for each four-day period of confinement or commitment. Subdivision (f) of section 4019 provides: "[I]f 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 . . . ." (See also Stats. 2009, 3d Ex. Sess., ch. 28, § 50.) Senate Bill No. 18 went into effect on January 25, 2010.

California courts are divided on the retroactive application of the amendment. The courts in *People v. Rodriguez* (2010) 182 Cal.App.4th 535, review granted June 9, 2010, S181808, *People v. Otubuah* (2010) 184 Cal.App.4th 422, and *People v. Hopkins* (2010) 184 Cal.App.4th 615, hold the amendments to section 4019 should not be given retroactive application. Other Court of Appeal panels that have published opinions on the issue hold that the amendment should be applied retroactively.[4] We are satisfied that the amendment should not to be applied retroactively.

The "primary purposes of conduct credits for prison inmates are to encourage conformity to prison regulations, to provide incentives to refrain from criminal, particularly assaultive, conduct, and to encourage participation in 'rehabilitative' activities. [Citations.]" (*People v. Austin* (1981) 30 Cal.3d 155, 163.) Senate Bill No. 18 "addresses the fiscal emergency declared by the Governor by proclamation on December 19, 2008." (Stats. 2009, 3d Ex. Sess., ch. 28, § 62.) It is not explicit on whether the amendment to section 4019 is to be applied only to credit earned after the operative date of the amendment, or to all presentence good conduct credit, whenever earned. The Senate Floor Analysis of Senate Bill No. 18 states simply, "This bill now makes changes related to public safety necessary to implement the Budget Revisions of the 2009 Budget." (Sen. Rules Com., Off. Of Sen. Floor Analyses, analysis of Sen. Bill No. 18 (2009-2010 3d. Ex. Sess.).)

In the absence of an express statement of legislative intent on retroactive application of the amendment, our analysis is governed by a number of normative rules, which we and the other courts have considered. Section 3 of the Penal Code provides: "No part [of the Penal Code] is retroactive, unless expressly so declared." This statute

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4 See *People v. Brown* (3d Dist., 2010) 182 Cal.App.4th 1354, review granted June 9, 2010, S181963; *People v. House* (2d Dist., Div 1, 2010) 183 Cal.App.4th 1049; *People v. Landon* (1st Dist., Div. 2, 2010) 183 Cal.App.4th 1096; *People v. Delgado* (2d Dist., Div. 6, 2010) 184 Cal.App.4th 271; *People v. Norton* (1st Dist., Div. 3, 2010) 184 Cal.App.4th 408; *People v. Pelayo* (1st Dist., Div. 5, 2010) 184 Cal.App.4th 481; and *People v. Keating* (2nd Dist., Div. 7, 2010) __ Cal.App.4th __ [2010 WL 2252631]. The cases are still coming down.

has been construed to mean "'[a] new statute is generally presumed to operate prospectively absent an express declaration of retroactivity or a clear and compelling implication that the Legislature intended otherwise. [Citation.]' (*People v. Hayes* (1989) 49 Cal.3d 1260, 1274.)" (*People v. Alford* (2007) 42 Cal.4th 749, 753.) "To ascertain whether a statute should be applied retroactively, legislative intent is the 'paramount' consideration . . . ." (*People v. Nasalga* (1996) 12 Cal.4th 784, 792.)

The leading case on the analysis of the retroactive application of amendments to criminal statutes is *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*). *Estrada* held that if an "amendatory statute *lessening* punishment becomes effective prior to the date the judgment of conviction becomes final then, . . . it, and not the old statute in effect when the prohibited act was committed, applies," unless the Legislature says otherwise. *Id.* at p. 744.) We do not believe *Estrada* governs the application of the 2009 statute, which does not reduce punishment as such and is different from the reduction in prison terms effected by the legislative change considered in that decision. In *People v. Otubuah*, *supra*, 184 Cal.App.4th ___ [2010 WL 1367449], the court concluded that "increases in custody credits should not be considered a mitigation in punishment." The *Otubuah* court reasoned that increasing the rate at which credits are accrued does not represent a legislative determination that a prior punishment was too severe. (184 Cal.App.4th ___ [2010 WL 1367449].)

Placing the arguments pro and con alongside each other—the presumption for prospective application, rules pointing to extension of ameliorative changes in penal laws to everyone to whom they might apply, and the inference to be drawn from the uncodified provision referring to the administrative burden of applying the new law—one could come to a point of near equipoise. But there is another provision that we believe breaks the stalemate in favor of prospective application. We note, first, that, as amended by Senate Bill No. 18, the general provision for conduct credit earned in prison is increased to the same ratio (1:1) as provided by section 4019 for county jail inmates. (A new provision, section 2933.05, provides further conduct reductions for prisoners who complete specified prisoner programs.) With a single exception, there is nothing in these

provisions indicating an intent for retroactive application for time spent in prison before the January 25, 2010 effective date of the enacting bill.

That exception is in section 2933.3, subdivision (d), in section 41 of the bill. It *expressly provides* for limited retroactive application of enhanced conduct credits, two days of credit for every day served, for prison inmates who have completed training as firefighters after July 1, 2009.[5] For these prisoners, the newly enhanced credit for prison time will apply retroactively for the period between July 1, 2009 and January 25, 2010. (§ 2933.3, subds. (b) & (c).) Reviewing this language, the court in *People v. Hopkins*, concluded that "[b]y expressly providing limited retroactivity in section 2933.3, subdivision (d), the Legislature demonstrated that it could, if it wished, similarly provide that other changes to the presentence credit scheme, such as the amendment to section 4019, would apply retroactively. Its failure to do so gives rise to the inference that the Legislature did not intend the amendment to section 4019 to have retroactive effect." (184 Cal.App.4th 615, ___ [2010 WL 1856031].) We agree with that analysis.

Section 59 of Senate Bill No. 18 provides: "The Department of Corrections and Rehabilitation shall implement the changes made to this act regarding time credits in a reasonable time. However, in light of limited case management resources, it is expected that there will be some delays in determining the amount of additional time credits to be granted against inmate sentences resulting from changes in law pursuant to this act. An inmate shall have no cause of action or claim for damages because of any additional time spent in custody due to reasonable delays in implementing the changes in the credit provisions of this act. However, to the extent that excess days in state prison due to delays in implementing this act are identified, they shall be considered as time spent on parole, if any parole period is applicable."

Some courts have taken this provision to signal a legislative intent that the amendment to section 4019 be applied retroactively. The rationale is that the Department

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[5] Section 2933.3, subdivision (d) provides: "The credits authorized in subdivisions (b) and (c) shall only apply to inmates who are eligible after July 1, 2009." (Stats. 2009, 3d Ex. Sess., ch. 28, § 41.)

staff would not need the same three-month period between the enactment and effective dates of the statute to calculate credit entitlements if the new law is limited to credits earned after the effective date. (*People v. Pelayo*, *supra*, 184 Cal.App.4th 481, ___.) Not all courts agree. In *Otubuah*, after examining other provisions of Senate Bill No. 18 which amend post-sentence credit provisions, the court concluded: "Thus, while the administrative burden on the Department of Corrections and Rehabilitation to implement the new credits would be higher if increased credits are applied retroactively, the burden would remain high even if all the increases, including section 4019, were applied prospectively. Accordingly, we infer no intent for retroactivity of the amendment of section 4019 from section 59 of Senate Bill No. 3X 18." (*People v. Otubuah*, *supra*, 184 Cal.App.4th 422, ___ [2010 WL 1367449].)

Appellant also argues that denial of retroactive application of the amendment to section 4019 would violate his right to equal protection under California Constitution, article 1, section 7. He cites *In re Kapperman* (1974) 11 Cal.3d 542 and *People v. Sage* (1980) 26 Cal.3d 498. In *Kapperman*, the court reviewed a provision which made custody credit prospective, applying only to persons delivered to the Department of Corrections after the effective date of the legislation. (*In re Kapperman*, *supra*, 11 Cal.3d at pp. 544-545.) The Supreme Court concluded that this limitation violated equal protection, and extended the benefits retroactively to those improperly excluded by the Legislature. (*Id*. at p. 545.) In *People v. Sage*, *supra*, 26 Cal.3d 498, the Supreme Court considered a previous version of section 4019 which denied presentence conduct credit to a detainee eventually sentenced to prison, although credit was given to detainees sentenced to jail and to felons who served no presentence time. (*Id*. at p. 507.) The Supreme Court found no rational basis, nor compelling state interest, to deny presentence conduct credit to detainee/felons. (*Id*. at p. 508.)

The *Hopkins* court rejected an equal protection argument similar to appellant's: "*Kapperman* is distinguishable because it addressed actual custody credits, not conduct credits. Conduct credits must be earned by a defendant, whereas custody credits are constitutionally required and awarded automatically on the basis of time served."

(*People v. Hopkins*, *supra*, 184 Cal.App.4th 615, ___ [2010 WL 1856031].) *Sage* was distinguished on the ground that the "purported equal protection violation at issue here is temporal, rather than based on the defendant's status as a misdemeanant or felon." (*Id.* at p. ___ [2010 WL 1856031].) The court in *Hopkins* reasoned: "The fact that a defendant's conduct cannot be influenced retroactively provides a rational basis for the Legislature's implicit intent that the amendment only apply prospectively." (*Ibid.*)

We agree that the authority cited by appellant is distinguishable and that there is a rational basis to support the prospective application of the amendment to section 4019.

DISPOSITION

The consecutive sentence on count 6 is stricken. The judgment of conviction is affirmed in all other respects.

CERTIFIED FOR PARTIAL PUBLICATION.

EPSTEIN, P. J.

We concur:

WILLHITE, J.

MANELLA, J.