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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JOSE GONZALEZ SANCHEZ, Defendant and Appellant.	H035075 (Santa Cruz County Super. Ct. No. F17818)

Defendant Jose Gonzalez Sanchez was convicted by jury trial of carrying a concealed firearm in a vehicle (Pen. Code, § 12025, subd. (a)(1)) and bringing a controlled substance into a jail (Pen. Code, § 4573). The jury found true allegations that the firearm was loaded and that defendant was "not listed with the California Department of Justice as the registered owner of the firearm." An allegation that defendant had suffered a prior juvenile adjudication that qualified as a strike was also found true. The jury could not reach a verdict on a felony count of active participation in a criminal street gang (Pen. Code, § 186.22, subd. (a)). After trial, defendant pleaded no contest to a misdemeanor count of active participation in a criminal street

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gang. He was committed to state prison to serve a term of seven years and four months.

On appeal, he contends that (1) the controlled substance count was not supported by substantial evidence that he voluntarily brought the substance into the jail after his arrest, (2) the trial court prejudicially erred in admitting into evidence a certificate stating that there was "no record" that defendant was the registered owner of any firearm, (3) his juvenile adjudication could not constitutionally be used as a strike, and (4) the trial court erred in failing to award him additional conduct credit under the January 2010 version of Penal Code section 4019[1] at his 2009 sentencing. We reject all of defendant's contentions but one. We conclude that the trial court prejudicially erred in admitting the certificate into evidence over his Sixth Amendment objection. Consequently, we reverse and remand for possible retrial of the firearm count.

I. Factual Background

Santa Cruz County Deputy Sheriff John Etheridge was driving along Highway 129 at about 10:00 p.m. on April 17, 2009 when he saw a vehicle quickly turn off the road. Etheridge was concerned that the vehicle might have broken down or "somebody was sick inside the car," so he turned around and drove back to the vehicle. He pulled in behind the vehicle and shined his spotlight on it. Etheridge saw three men standing outside the vehicle. One of them was defendant, and another was defendant's brother. The third man "looked very tense." Etheridge got out of his patrol car and said: "Hey, sheriff's office. What's going on?"

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[1] Subsequent statutory references are to the Penal Code unless otherwise specified.

Defendant, whose back was to Etheridge, "looked like he tucked something into his waistband" and then he walked toward the vehicle. Etheridge yelled at defendant and his brother to "stop and show me their hands." They did not stop, and both of them approached the vehicle. Meanwhile, the third man, who "looked really scared," walked toward the back of Etheridge's patrol car. Defendant got into his vehicle and started "rooting around." Etheridge yelled at him to "get out of the car." Defendant got out of the vehicle, walked to its rear bumper and then returned to the vehicle and did more "rooting around." His activities were near the bottom of the driver's seat. Defendant exited the vehicle again, this time with some paperwork in his hand. Etheridge had not asked defendant for his license or registration.

Etheridge yelled at defendant to "get on the ground," but defendant did not comply. Defendant's brother tossed something small into the back seat of the car. Etheridge continued to yell at defendant and his brother to "get on the ground." Eventually, defendant and his brother complied. The third man also got on the ground. Etheridge called for backup. When backup arrived, the three men were handcuffed and placed in separate patrol cars. Defendant was handcuffed with his hands behind him.

Etheridge looked inside the vehicle and saw, in plain sight, "several bullets laying [*sic*] on the floorboard of the car." He then looked under the driver's seat and "saw the handle of a handgun sticking out." The gun was a Colt 357 Magnum revolver, which was loaded with six rounds in its chamber. Etheridge could not find a serial number on the revolver. A small pocketknife was in the back seat.

Defendant told the police that he had been the driver of the vehicle, and he acknowledged that he had "illegal stuff" in the vehicle. Defendant was pat searched for weapons and then transported to the county jail and booked. When he was searched at the jail by jail security personnel, the initial search, which was done with his clothes on, disclosed nothing. During the subsequent strip search, a "white bindle"

was observed "close to his anus." Defendant was asked about the bindle, and he "quickly reached around with his right hand between his buttocks, grabbed the white bindle and quickly put it in his mouth attempting to swallow it." He was told to spit it out, and he did so. The bindle contained about a half gram of cocaine.

II. Procedural Background

Defendant was charged by amended information with actively participating in a criminal street gang (§ 186.22, subd. (a)), carrying a concealed firearm in a vehicle (§ 12025, subd. (a)(1)), and bringing a controlled substance into a jail (§ 4573). The amended information further alleged as to the firearm count that "the firearm and unexpended ammunition were in the immediate possession of, and readily accessible to, the Defendant and that the firearm was not registered to the Defendant." (§ 12025, subd. (b)(6).) The firearm count was also the subject of a gang enhancement allegation (§ 186.22, subd. (b)(1)). The amended information also alleged that defendant had suffered a prior juvenile adjudication that qualified as a strike (§ 667, subds. (b)-(i)).

The jury returned guilty verdicts on the controlled substance and firearm counts, and it found true allegations "that the firearm was loaded" and that defendant was "not listed with the California Department of Justice as the registered owner of the firearm."[2] The jury also found true the allegation that defendant had suffered a prior

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[2] A section 12025, subdivision (b)(6) allegation may be found true where the defendant is not listed as the registered owner of the firearm and "[b]oth the pistol, revolver, or other firearm capable of being concealed upon the person and the unexpended ammunition capable of being discharged from that firearm are either in the immediate possession of the person or readily accessible to that person, ***or*** *the pistol, revolver, or other firearm capable of being concealed upon the person is loaded* as defined in subdivision (g) of Section 12031." (§ 12025, subd. (b)(6)(A), bold and italics added.) The amended information charged one of the two alternatives, while

juvenile adjudication for assault with a deadly weapon that qualified as a strike. The jury was unable to reach a verdict on the gang count or the gang allegation. Defendant subsequently pleaded no contest to a misdemeanor gang count, and the gang enhancement allegation was dismissed.

Defendant was sentenced on December 14, 2009. The court denied defendant's motion to strike the prior juvenile adjudication finding, and it imposed a six-year doubled midterm sentence for the controlled substance count and a consecutive doubled one-third the midterm sentence of one year and four months for the firearm count. Defendant was awarded 89 days of custody credit and 44 days of conduct credit under former section 4019. Defendant timely filed a notice of appeal.

III. Discussion

A. Controlled Substance Count

1. Background

When the court orally instructed the jury on the controlled substance count, it told the jury that defendant was charged with "*willfully and* knowingly bringing cocaine, a controlled substance, into a penal institution," and that the prosecution was required to prove that "defendant knowingly and voluntarily brought the substance into a penal institution." (Italics added.) On the written instruction subsequently provided to the jury, the words "willfully and" were blacked out.[3] The jury was also instructed that this count required proof of "wrongful intent." "For you to find a

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the jury found true the other alternative. Defendant does not note this inconsistency or claim that it prejudiced him.

[3] After the jury retired to begin its deliberations, the court and counsel discussed the fact that the instruction on this offense read to the jury had erroneously included the words "willfully and." The court asked defendant's trial counsel to prepare a corrected instruction. The instruction that appears in the clerk's transcript reflects that the words "willfully and" were marked out on the copy given to the jury.

person guilty of these crimes that person must not only commit the prohibited act, but must do so with the wrongful intent. [¶] A person acts with wrongful intent when he intentionally does a prohibited act on purpose." The jury was also instructed on the lesser offense of possession of a controlled substance.

The prosecutor argued to the jury: "Now, the only argument on this charge the defense can make is that he didn't knowingly and voluntarily bring it into the jail, but the evidence suggests he did. You have that packaging booked into evidence. Open it up, take a look at the bindle and, guess what, there's no tape. There's no tape. And that's significant because that means it wasn't stored long-term near his anus. You probably wouldn't want to store something near your anus that you intended to ingest later on anyway. It might not be very hyg[i]enic. But even if he was riding around all day long with that in his buttocks, he would have had to tape it in place. That's the only reasonable interpretation because, otherwise, all day long he would be walking like this (indicating). How is he going to keep it in there? The reasonable explanation of the evidence, ladies and gentlemen, is that he had the drugs somewhere else when he was taken into custody and then he transferred those drugs into his buttocks in an attempt to smuggle them inside the jail. . . . The fact that there is no tape holding that in place also supports the inference that it was a spur of the moment thing. He had to do it and he had to do it quickly to avoid detection and to bring that substance into the jail with him."

Defendant's trial counsel argued that defendant had not "knowingly and voluntarily brought the substance into a penal institution." "He is guilty of possessing it, but knowingly and voluntarily bringing the substance into a penal institution he is not because he didn't voluntarily go to jail. He wasn't bringing it in visiting someone. He wasn't trying to bring it into the jail. It wasn't voluntarily. He was handcuffed, put into the backseat of a car and brought to jail."

The prosecutor responded in his closing argument. "Is it possible that the defendant had that [cocaine] and just involuntarily was taken to the jail? Sure. But look at the defendant's conduct. Number one; it was secreted in a place that people don't normally put things they're going to consume. And, number two; when the correction[s] officer did it [*sic*] find it, what did he do? Did he say, hey, man, you got me? I'm sorry. It was in the field. You can go ahead and take it away now. No. He tried to destroy it. He grabbed it and ate it to get rid of the evidence. That lends itself to the reasonable inference that he was trying to smuggle it into the jail in the first place."

2. Analysis

Defendant challenges the sufficiency of the evidence to support a finding that he violated section 4573.

"Except [when authorized], any person, who knowingly brings or sends into, or knowingly assists in bringing into, or sending into, any state prison . . . or into any county, city and county, or city jail . . . or within the grounds belonging to the institution, any controlled substance . . . is guilty of a felony punishable by imprisonment in the state prison for two, three, or four years. [¶] The prohibitions and sanctions addressed in this section shall be clearly and prominently posted outside of, and at the entrance to, the grounds of all detention facilities under the jurisdiction of, or operated by, the state or any city, county, or city and county." (§ 4573.)

After the opening appellate brief and response brief were filed in this case, the California Supreme Court issued two decisions on the validity of applying section 4573 to arrestees who are compelled to enter the jail.[4] (*People v. Low* (2010) 49

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[4] Defendant's opening brief was filed in March 2010. The Attorney General's response brief was filed on June 10, 2010. *Low* and *Gastello* were issued on June 24, 2010. Defendant's reply brief was filed in July 2010.

Cal.4th 372 (*Low*); *People v. Gastello* (2010) 49 Cal.4th 395 (*Gastello*).) In both *Low* and *Gastello*, the California Supreme Court rejected challenges to section 4573 convictions by arrestees who were brought into the jail. In his reply brief, defendant contends that *Low* and *Gastello* support his challenge to the sufficiency of the evidence. *Low* and *Gastello* provide the definitive interpretation of section 4573, and they do not support defendant's claim.

Low was arrested while driving a stolen truck. (*Low*, *supra*, 49 Cal.4th at p. 377.) He was informed by the arresting officer that it was illegal to bring a controlled substance into the jail, and he denied that he had any such substance in his possession. During a subsequent inventory search at the jail, methamphetamine was found tucked into Low's sock. (*Low*, at pp. 375, 377-378.) Low claimed that section 4573 "does not apply to someone, like him, who happens to possess a controlled substance when arrested for another crime, and who *was brought* into jail involuntarily in order to be booked pursuant to that arrest."[5] (*Low*, at p. 381.) The California Supreme Court rejected this claim. "California courts have long assumed that arrestees and other persons in custody can violate section 4573, and 'bring[ ]' a controlled substance into jail, when the entry is officially compelled and drugs are secreted on their person." (*Low*, at p. 383.) "The critical factors are the lack of any compulsion to bring contraband inside, and the rejection of a clear opportunity to avoid doing so by voluntarily relinquishing the forbidden object or substance before entering the premises. . . . [S]uch volitional conduct falls within the parameters of section 4573." (*Low*, at p. 384.) "Defendant entered jail in the possession of

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[5] The jury instructions in *Low* did not explicitly require the jury to find that Low "voluntarily" brought the substance into the jail. (*Low*, *supra*, 49 Cal.4th at p. 379, fn. 4.) Here, the jury was explicitly required to find that defendant "voluntarily" brought a controlled substance into the jail.

methamphetamine that he had previously secreted on his person. Hence, he committed the act that section 4573 proscribes." (*Low*, at p. 385.)

The court reached a similar conclusion in *Gastello*. Gastello was arrested for being under the influence and transported to the jail. The arresting officer told him that it was a felony to bring drugs into the jail. (*Gastello, supra,* 49 Cal.4th at pp. 398-399.) During an inventory search at the jail, a bindle containing methamphetamine was found in Gastello's clothing. (*Gastello*, at p. 399.) Gastello was convicted of violating section 4573. The Court of Appeal overturned his conviction on the grounds that he had neither committed the proscribed act, because his presence in the jail was involuntary, nor harbored the requisite intent because he did not intend to enter the jail. (*Gastello*, at p. 401.) The California Supreme Court, relying on *Low*, reversed the Court of Appeal. "*Low* finds it immaterial that the defendant was in custody and not present by choice in jail. The critical fact is that an arrestee has the opportunity to decide whether to purge himself of hidden drugs before entering jail, or whether to bring them inside and commit a new crime under section 4573." (*Gastello*, at p. 402.) "*Low* demonstrates that the proscribed act is 'knowingly' performed under section 4573 where the person knew when he entered jail that he possessed a controlled substance." (*Gastello*, at pp. 402-403.)

Defendant claims that he did not commit the act proscribed by section 4573. He claims that *Low* and *Gastello* are distinguishable because both Low and Gastello were *warned* by the arresting officers that bringing drugs into the jail was prohibited. While defendant correctly points out a factual distinction between this case and those two cases, this factual distinction is irrelevant to his claim that he did not commit the proscribed act. The proscribed act is entering the jail with a controlled substance secreted on one's person. (*Low, supra,* 49 Cal.4th at pp. 383-385.) "[It is] immaterial that the defendant was in custody and not present by choice in jail. The critical fact is that an arrestee has the opportunity to decide whether to purge himself of hidden drugs

before entering jail, or whether to bring them inside and commit a new crime under section 4573." (*Gastello*, *supra*, 49 Cal.4th at p. 402.)

Defendant contends that, in the absence of a warning that bringing drugs into the jail is prohibited, he lacked any "opportunity . . . to purge himself of hidden drugs before entering the jail." Not so. A warning is not necessary to provide an opportunity for a defendant to purge himself of the drugs. Here, after defendant was arrested, defendant spoke to the arresting officer and was pat searched. He knew that he had the bindle secreted on his person and that he was about to be transported to jail. Thus, at this point, he had an "opportunity" to "purge himself" of the bindle by informing the arresting officer of its presence before being taken into the jail. Defendant's reliance on the absence of an explicit warning by the arresting officer is misplaced. A warning might be relevant to the recipient's mental state, but no warning can change the nature of an act.[6] Warned or unwarned, an arrestee who brings drugs into a jail commits the prohibited act unless he or she lacked any opportunity to disclose the presence of the drugs or discard the drugs before being brought into the jail. As substantial evidence supports a finding that defendant had such an opportunity, we reject defendant's claim that he did not commit the proscribed act.

Defendant also contends that he lacked the requisite intent. The requisite intent is knowledge. "[T]he proscribed act is 'knowingly' performed under section 4573 where the person knew when he entered jail that he possessed a controlled substance." (*Gastello*, *supra*, 49 Cal.4th at pp. 402-403.) Defendant "does not dispute" that he knew he had the cocaine in his possession when he entered the jail. His claim is that he lacked "an intent to bring cocaine into [the] jail." *Low* and *Gastello* rejected the

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[6] Section 4573 requires every jail to post a warning of section 4573's provisions at the jail's entry. It must be presumed that this official duty was performed. (Evid. Code, § 664.) Of course, we do not rely upon this presumption as the jury was not informed of it.

claim that section 4573 requires such an intent. Therefore, we must reject defendant's claim.

Substantial evidence supports the jury's finding that defendant violated section 4573.

B. Firearm Count

1. Background

During the prosecution's case-in-chief, the following colloquy occurred. "MR. BAUM [the prosecutor]: Yes. Your Honor, I have a certified letter from the California Department of Justice firearms division that I would like marked as People's next in order. [¶] THE COURT: It will be so marked and that would be Number 32, People's 32. [¶] (People's Exhibit Number 32 marked for identification.) [¶] MR. BAUM: And, Your Honor, I would move this into evidence as People's 32 under Evidence Code Section 1284, certification of no records from a California state employee. [¶] THE COURT: Any objection to this coming in? [¶] MR. GARVER [defendant's trial counsel]: Your Honor -- yes, I do. If I can address that outside the presence of the jury. [¶] THE COURT: Okay. We'll take that then up later."

Exhibit 32 is a two-page document. The first page of this document is a letter dated April 22, 2009 from the Department of Justice to the District Attorney. The letter states that it is "in response to a April 21, 2009, request regarding Docket Case Number: F17818," which is the superior court number of this case. The second page of this document is entitled "CERTIFICATION" and is signed by "SHERRY CARTER, Manager [¶] Custodian of Records [¶] Automated Firearms Systems Unit [¶] Bureau of Firearms [¶] For EDMUND G. BROWN JR. [¶] Attorney General." Between the title and the signature, the document states: "I, Sherry Carter, do certify and attest under penalty of perjury that I am the legal custodian of the records stored in the Automated Firearms System, maintained by the Department of Justice, Bureau of

Firearms. This file contains records of Dealer's Record of Sale of Revolvers or Pistols, and all other firearm records entered by the Department of Justice and law enforcement agencies in California. [¶] On April 21, 2009, a diligent search of the Automated Firearms System was conducted for the Firearm Ownership History of Jose Gonzalez Sanchez, whose date of birth is listed as May 18, 1990. The search revealed no record. [¶] I certify the enclosed documents are complete, true, and exact copies. This certification was prepared by personnel of the Department of Justice in the ordinary course of business on the date stated above." Although the certification referred to "enclosed documents," no documents were attached to the certification.

After the brief colloquy about exhibit 32, the prosecutor stated that he had no further witnesses, and the court asked the jury to step outside. The court and counsel discussed another exhibit, and then the court asked defendant's trial counsel: "As to Exhibit 32, what is your position?" This colloquy ensued. "MR. GARVER: Your Honor, I did need to look at 1284 again. [¶] THE COURT: 1284? [¶] MR. GARVER: Yes. I was just looking at the notes on that. [¶] THE COURT: Okay. [¶] MR. GARVER: It appears to be admissible under that, so -- [¶] THE COURT: Okay. So you withdraw your objection? [¶] MR. GARVER: Yes. [¶] THE COURT: 32 will be in evidence then at this time."

When the jury returned to the courtroom after the court's colloquy with counsel, the court immediately excused them for the day. The next morning, before the jury was brought into the courtroom, defendant's trial counsel revived his objection to exhibit 32. "MR. GARVER: I did have an objection to Exhibit 32 which I did not state yesterday and that is -- the objection is pursuant to [defendant's] right to confront and cross-examine witnesses and that's what I object to, the United States and California constitutional rights to confront and cross-examine witnesses." The court responded: "Okay. The Court has ruled on that. Your objection is noted." The jury returned to the courtroom, and the prosecutor played for the jury a videotape of

Etheridge's encounter with defendant. The prosecution then rested, and the defense did also.

The jury instruction on the firearm offense stated that "defendant is charged in Count 2 with unlawfully carrying a loaded, unregistered and concealed firearm within the vehicle," but the four enumerated elements and the remainder of the instruction said nothing about the "unregistered" requirement. However, the verdict forms asked the jury to make special findings on "the allegation that the defendant was not listed with the California Department of Justice as the registered owner of the firearm" and "the allegation that the firearm was loaded."

The prosecutor argued to the jury: "The special allegations: That the gun was loaded and that it wasn't registered to the defendant. You have abundant evidence of that. There's the picture right there; the 357 magnum revolver, six rounds in the cylinder, ready to go. You also have a certified letter from the California Department of Justice Firearm[s] Division saying that not only was the gun not registered to the defendant, no guns were registered to the defendant, period. Full stop. He did not have any weapons that were lawfully registered to him." Defendant's trial counsel did not mention the "unregistered" allegation in his closing argument. The jury made a true finding on the "unregistered" allegation.

2. Analysis

Defendant asserts that the trial court prejudicially erred in admitting exhibit 32 into evidence over his objection. The Attorney General contends that defendant forfeited his objection because the objection was untimely and defendant's trial counsel "never pressed for an actual ruling on the objection." The Attorney General also maintains that the trial court did not err in admitting exhibit 32 and that any error was harmless beyond a reasonable doubt.

a. Forfeiture

The Attorney General first claims that defendant's objection was not timely. "A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless: [¶] (a) There appears of record an objection to . . . the evidence that *was timely made* and so stated as to make clear the specific ground of the objection or motion." (Evid. Code, § 353, italics added.)

Although the trial court had formally admitted exhibit 32 into evidence before defendant interposed his objection, the jury was not present in the courtroom, and the court excused the jury for the day upon its return. Defendant interposed his objection the next morning before the jury entered the courtroom. Thus, the objection was interposed before the jury was actually exposed to exhibit 32. The Attorney General cites no authority for the proposition that an objection is untimely even though it was raised before the jury was exposed to the challenged evidence. "The requirement that an objection to evidence be timely made is important because it 'allows the court to remedy the situation before any prejudice accrues.'" (*People v. Boyette* (2002) 29 Cal.4th 381, 424.) Defendant's objection was made in a timely fashion because, at the time of the objection, the trial court still had the opportunity to exclude exhibit 32 without any prejudice accruing, as the jury had not yet been exposed to this evidence.

The Attorney General also asserts that the objection was forfeited because defendant's trial counsel "never pressed for an actual ruling" on his objection. In response to defendant's trial counsel's objection, the trial court asserted that "The Court has ruled on that. Your objection is noted." The Attorney General claims that defendant's trial counsel "was obligated to request a further hearing for the court to actually rule" on the objection.

The cases cited by the Attorney General on this point are distinguishable. In *People v. Morris* (1991) 53 Cal.3d 152 (*Morris*), disapproved on another ground in

People v. Stansbury (1995) 9 Cal.4th 824, 830, fn.1, the defendant's trial counsel moved in advance of trial to exclude certain evidence. The trial court held a hearing on the motion, but it *made no ruling* on the motion at the hearing. When the evidence was later offered at trial, no objection was interposed. Under those circumstances, the California Supreme Court held that the defense had forfeited its objection by failing to "press" for a ruling and failing to object when the evidence was introduced at trial thereby "depriving the trial court of the opportunity to correct potential error." (*Morris*, at p. 195.) In *People v. Hayes* (1990) 52 Cal.3d 577 (*Hayes*), the defendant's trial counsel objected to certain evidence under Evidence Code section 1101. Although Evidence Code section 352 was mentioned by the trial court, the defendant's trial counsel never requested a ruling on an Evidence Code section 352 objection, and the trial court never made such a ruling. (*Hayes*, at p. 618.) The California Supreme Court ruled that "counsel's failure to obtain a ruling is fatal to defendant's appellate contention, for a party objecting to the admission of evidence must press for an actual ruling or the point is not preserved for appeal." (*Hayes*, at p. 619.)

Unlike the situations in *Morris* and *Hayes*, defendant's trial counsel did not fail to obtain a ruling on his objection. "Failure to press for a ruling on a motion to exclude evidence forfeits appellate review of the claim because such failure deprives the trial court of the opportunity to correct potential error in the first instance." (*People v. Lewis* (2008) 43 Cal.4th 415, 481.) Here, the trial court was not deprived of the opportunity to "correct potential error" as it insisted that it had already overruled defendant's objection. As it would have been futile for defendant's trial counsel to "press for an actual ruling" when the court insisted that it had already ruled on the objection, the objection was not forfeited.

b. Error

Defendant claims that the admission of exhibit 32 was a violation of his Sixth Amendment right to confront witnesses against him.

The seminal case on the scope of the Sixth Amendment's confrontation right is the United States Supreme Court's decision in *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*). In *Crawford*, the court pointed out that the Sixth Amendment does not apply to all hearsay; it applies to only "'testimonial' statements." (*Crawford*, at p. 51.) The court explained that a testimonial statement is "'[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" (*Ibid.*) This definition was repeated in *Davis v. Washington* (2006) 547 U.S. 813 (*Davis*), in which the court reiterated that the Sixth Amendment applies to only testimonial statements. (*Davis*, at pp. 822-824.)

The United States Supreme Court subsequently decided *Melendez-Diaz v. Massachusetts* (2009) __ U.S. __ [129 S.Ct. 2527] (*Melendez-Diaz*). The issue in *Melendez-Diaz* was whether "'certificates of analysis'" introduced in a criminal trial to show that a substance had been analyzed and found to be cocaine were "testimonial" statements for Sixth Amendment purposes. (*Melendez-Diaz*, at pp. __ [129 S.Ct. at pp. 2530, 2531].) A state law had permitted such evidence to be introduced at the defendant's trial, and the state court had rejected the defendant's Sixth Amendment objection. (*Melendez-Diaz*, at p. __ [129 S.Ct. at p. 2531].) The United States Supreme Court found that the "'certificates'" fell "within the 'core class of testimonial statements'" described in *Crawford* and therefore were vulnerable to a Sixth Amendment objection. (*Melendez-Diaz*, at p. [129 S.Ct. at p. 2532].) "The documents at issue here, while denominated by Massachusetts law 'certificates,' are quite plainly affidavits . . . . They are incontrovertibly a '"solemn declaration or affirmation made for the purpose of establishing or proving some fact."' [Citations.] The fact in question is that the substance found in the possession of Melendez-Diaz and his codefendants was, as the prosecution claimed, cocaine—the precise testimony the analysts would be expected to provide if called at trial. The 'certificates' are

functionally identical to live, in-court testimony, doing 'precisely what a witness does on direct examination.'" (*Ibid*.)

In *Melendez-Diaz*, the United States Supreme Court took the position that the certificates were testimonial statements subject to confrontation even if they qualified as official or business records because the certificates had been prepared for use in court. (*Melendez-Diaz*, *supra*, __ U.S. at p. __ [129 S.Ct. at p. 2538].) "Whether or not they qualify as business or official records, the analysts' statements here—prepared specifically for use at petitioner's trial—were testimony against petitioner, and the analysts were subject to confrontation under the Sixth Amendment." (*Melendez-Diaz*, at p. __ [129 S.Ct. at p. 2540.) The court distinguished cases involving nontestimonial business or official records. "Far more probative here are those cases in which the prosecution sought to admit into evidence a clerk's certificate attesting to the fact that the clerk had searched for a particular relevant record and failed to find it. Like the testimony of the analysts in this case, the clerk's statement would serve as substantive evidence against the defendant whose guilt depended on the nonexistence of the record for which the clerk searched. Although the clerk's certificate would qualify as an official record under respondent's definition—it was prepared by a public officer in the regular course of his official duties—and although the clerk was certainly not a 'conventional witness' under the dissent's approach, the clerk was nonetheless subject to confrontation." (*Melendez-Diaz*, at p. __ [129 S.Ct. at p. 2539].)

Justice Thomas provided the fifth vote in *Melendez-Diaz*. His concurring opinion read, in its entirety: "I write separately to note that I continue to adhere to my position that 'the Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.' [Citations.] I *join the Court's opinion* in this case because the documents at issue in this case 'are quite plainly affidavits,'

[citation]. As such, they 'fall within the core class of testimonial statements' governed by the Confrontation Clause. [Citation.]" (*Melendez-Diaz, supra,* __ U.S. at p. __ [129 S.Ct. at p. 2543] (conc. opn. of Thomas, J.), italics added.)

Defendant asserts that *Melendez-Diaz* establishes that exhibit 32 was a testimonial statement that was inadmissible over his Sixth Amendment objection. The Attorney General acknowledges that *Melendez-Diaz* supports defendant's contention. Yet he claims that this court is "foreclosed" from relying on *Melendez-Diaz* because, prior to *Melendez-Diaz*, the California Supreme Court allegedly upheld the admission of such evidence in its decision in *People v. Geier* (2007) 41 Cal.4th 555 (*Geier*). As the Attorney General's reliance on *Geier* is misplaced, his counter-argument to the application of *Melendez-Diaz* fails.

In *Geier*, the defendant claimed that the trial court had prejudicially erred in admitting expert testimony by a doctor based on a DNA report where the testifying doctor had not himself conducted the DNA analysis. The DNA analysis had been conducted by another individual, who did not testify at trial. (*Geier, supra,* 41 Cal.4th at pp. 596, 598.) The California Supreme Court identified the issue as "whether the admission of scientific evidence, like laboratory reports, constitutes a testimonial statement . . . ." (*Geier*, at p. 598.) The court explained that there was a split of authority about whether "scientific evidence is not testimonial." (*Geier*, at pp. 598-600.) After discussing those cases, the court reached a very narrow decision limited to "the kind of scientific evidence at issue in this case . . . ." (*Geier*, at p. 605.)

"For our purposes in this case, involving the admission of a DNA report, what we extract from those decisions is that a statement is testimonial if (1) it is made to a law enforcement officer or by or to a law enforcement agent and (2) describes a past fact related to criminal activity for (3) possible use at a later trial. Conversely, a statement that does not meet all three criteria is not testimonial." (*Geier, supra,* 41 Cal.4th at p. 605.) Because, in the California Supreme Court's view, the DNA report

did not "describe[] a past fact" but was instead a contemporaneous record of the results of the analysis as it was actually being performed, the court concluded that the DNA report was not testimonial under *Crawford*. (*Geier*, at pp. 605-606.) The court pointed out that "the accusatory opinions in this case—that defendant's DNA matched that taken from the victim's vagina and that such a result was very unlikely unless defendant was the donor—were reached and conveyed not through the nontestifying technician's laboratory notes and report, but by the testifying witness, Dr. Cotton." (*Geier*, at p. 607.)

The question of the validity of *Geier* after *Melendez-Diaz* is currently pending before the California Supreme Court.[7] However, it is not necessary to resolve that question in order to decide this case. "We acknowledge, as we must, that we are bound to follow binding precedent of a higher court, and that the refusal to do so is in excess of our own jurisdiction. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455-456 [20 Cal.Rptr. 321, 369 P.2d 937].)" (*Fireman's Fund Ins. Co. v. Maryland Casualty Co.* (1998) 65 Cal.App.4th 1279, 1300-1301.) "It is a foundational principle that: ''[T]he language of an opinion must be construed with reference to the facts presented by the case, and the positive authority of a decision is coextensive only with such facts.'' [Citations.] 'A litigant cannot find shelter under a rule announced in a decision that is inapplicable to a different factual situation in his own case, nor may a decision of a court be rested on quotations from previous opinions that are not pertinent by reason of dissimilarity of facts in the cited cases and in those in the case under consideration.'" (*Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1157.)

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[7] *People v. Rutterschmidt* (2009) 176 Cal.App.4th 1047, review granted December 2, 2009, S176213.

The binding precedent of *Geier* is restricted to its facts and the specific issue that was addressed therein by the California Supreme Court. In *Geier*, a DNA report was introduced through the testimony of an expert witness other than the person who had conducted the analysis and prepared the report. The California Supreme Court limited its discussion to the admissibility of "scientific evidence" under those circumstances and held that the DNA report was not testimonial. We are obviously bound by that holding. However, the case before us is readily distinguishable from *Geier*. No witness testified regarding exhibit 32, and it was not "scientific evidence." Hence, the binding precedent of *Geier* has no impact here.[8]

The Attorney General contends that *Melendez-Diaz*'s holding does not extend to a certificate of no record (CNR), like exhibit 32, because (1) the firearms database is a business record, (2) a CNR "does not resemble the examples of testimonial evidence cited in *Crawford*," (3) a CNR is "prepared in the ordinary course of public business," (4) the declarant executing a CNR "does not 'testify,'" and (5) there would be "no appreciable value in cross-examination" of the declarant.

None of these contentions has merit. First, *Melendez-Diaz* held that an affidavit prepared for a criminal trial does not cease to be testimonial simply because it may qualify as a business or official record. (*Melendez-Diaz, supra,* __U.S. at p. __ [129 S.Ct. at pp. 2539-2540].) Thus, it is immaterial whether the firearms database is a business or official record or whether exhibit 32 was prepared in the ordinary course of

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[8] Even if we were to apply *Geier*'s test, it would still lead to the conclusion that exhibit 32 was testimonial. *Geier* stated that "a statement is testimonial if (1) it is made to a law enforcement officer or by or to a law enforcement agent and (2) describes a past fact related to criminal activity for (3) possible use at a later trial. Conversely, a statement that does not meet all three criteria is not testimonial." (*Geier, supra,* 41 Cal.4th at p. 605.) Exhibit 32 was prepared by the Attorney General, a law enforcement officer. It described a "past fact related to criminal activity," defendant's past failure to register a firearm. Exhibit 32 was also prepared at the prosecutor's request for use at this trial.

public business. Second, *Crawford* carefully avoided identifying precisely which specific categories of evidence were testimonial, so the absence of a specific reference to a CNR in *Crawford* tells us nothing. *Melendez-Diaz* explicitly identified a CNR as an example of testimonial evidence. (*Melendez-Diaz*, at p. __ [129 S.Ct. at p. 2540].) While that mention was dicta, a CNR plainly fits within the general definition of a testimonial statement provided in *Crawford* itself: "'[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" (*Crawford*, *supra*, 541 U.S. at p. 51; see also *Davis*, *supra*, 547 U.S. at pp. 822-824.) Third, the Attorney General's claim that the declarant of a CNR "does not 'testify'" merely assumes a conclusion. The declarant of a CNR makes a statement of fact under penalty of perjury in a document prepared for trial and utilized to prove the fact expressed therein. *Melendez-Diaz* held that such a document is testimonial. Finally, the Attorney General's claim that cross-examination of the declarant would have "no appreciable value" is of no relevance to the determination of whether exhibit 32 was testimonial. The determination of whether a right guaranteed by the United States Constitution has been violated does not rest on a post hoc determination of the "value" of that right.[9]

The Attorney General's final argument is that we should follow a recent decision of the Supreme Judicial Court of Maine finding nontestimonial a certificate executed by the Secretary of State stating that the defendant had been notified that his

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[9] We can easily postulate areas of cross-examination that might have merit in challenging a CNR. A defendant might inquire as to whether the search looked only for the combination of his name and birth date or looked for each individually. Through cross-examination he might have been able to suggest that a misspelling of his name, a typographical error in the entry of his birth date, or the inadvertent switching of his middle and last names or middle and first names accounted for the failure of the search to find a firearm registration record. Since the issue is whether this type of evidence is testimonial, we do not consider the specific facts of this case, but rather the nature of the evidence as a class.

driver's license had been suspended. In *State v. Murphy* (Me. 2010) 991 A.2d 35 (*Murphy*), the defendant was charged with driving with a suspended license, and an element of this offense was that the defendant had been notified by the Secretary of State of the suspension of his license. At trial, the certificate was admitted into evidence over the defendant's Sixth Amendment objection. (*Murphy*, at p. 36 & fn. 2.) A copy of a letter from the Secretary of State notifying the defendant of the suspension, which "established the same fact" as the certificate, was also admitted into evidence. (*Murphy*, at pp. 36 & fn. 2, 37.) On appeal, the defendant claimed that *Melendez-Diaz* barred the admission of the certificate. The Maine court rejected this claim on some of the same grounds that the Attorney General has asserted above. The Maine court decided that *Melendez-Diaz* was limited to scientific evidence and that the portion of *Melendez-Diaz* addressing certificates of no record was "'obiter dictum.'" (*Murphy*, at p. 42.) No court has followed the Maine court's decision. As we have rejected the reasoning underlying the Maine court's decision, we decline to follow it.

As defendant points out, the Maine court's decision stands alone. Several other courts have reached the opposite conclusion. In *Tabaka v. District of Columbia* (D.C. 2009) 976 A.2d 173 (*Tabaka*), a prosecution for driving without a license, the District of Columbia Court of Appeals found testimonial a certificate issued by the DMV stating that it had no record that the defendant had ever been issued a driver's license. (*Tabaka*, at p. 175.) In *United States v. Martinez-Rios* (5th Cir. 2010) 595 F.3d 581 (*Martinez-Rios*), a prosecution for illegal reentry, the Fifth Circuit United States Court of Appeals found testimonial a certificate stating that a database search had found no record that the defendant had been granted permission to reapply for admission to the United States. (*Martinez-Rios*, at pp. 583-584, 586.) In *Washington v. State* (Fla.Dist.Ct.App. 2009) 18 So.3d 1221 (*Washington*), a prosecution for acting as an unlicensed contractor during a state of emergency, the Florida District Court of Appeal found testimonial a certificate attesting that there was no record that the defendant had

a contractor's license. (*Washington*, at pp. 1223-1224.) In *State v. Alvarez-Amador* (Or.Ct.App. 2010) 235 Or.App. 402 (*Alvarez-Amador*), a prosecution for identity theft, the Oregon Court of Appeals found testimonial certificates from the Social Security Administration attesting that the social security numbers used by the defendant were not his but belonged to deceased persons. (*Alvarez-Amador*, at pp. 404-405, 409-411.)

The certificate introduced in this case, like the certificates introduced in *Tabaka*, *Martinez-Rios*, *Washington*, and *Alvarez-Amador*, was testimonial because it was "'[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" (*Crawford*, *supra*, 541 U.S. at p. 51; see also *Davis*, *supra*, 547 U.S. at pp. 822-824.) Consequently, the trial court violated defendant's federal constitutional rights when it admitted exhibit 32 into evidence.

c. Prejudice

The Attorney General contends that the erroneous admission of exhibit 32 was harmless beyond a reasonable doubt.

Where a criminal defendant's Sixth Amendment confrontation right has been violated, reversal is required unless the error was harmless beyond a reasonable doubt. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 684.) This standard of review requires "the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*).) Reversal is required if there is a "'reasonable possibility that the evidence complained of might have contributed to the conviction.'" (*Chapman*, at p. 23; *Yates v. Evatt* (1991) 500 U.S. 391, 403 (*Yates*), disapproved on another point in *Estelle v. McGuire* (1991) 502 U.S. 62, 72, fn. 4.) "To say that an error did not 'contribute' to the ensuing verdict is not, of course, to say that the jury was totally unaware of that feature of the trial later held to have been erroneous." (*Yates*, at p. 403.) "To say that an error did not contribute to the verdict is, rather, to find that error unimportant in relation to everything else the jury

considered on the issue in question, as revealed in the record. Thus, to say that [the error] did not contribute to the verdict is to make a judgment about the significance of the [error] to reasonable jurors, when measured against the other evidence considered by those jurors independently of the [error]." (*Yates*, at pp. 403-404.) "[T]he appropriate inquiry is 'not whether, in a trial that occurred without the error, a guilty verdict would *surely* have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error.' (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279 [113 S.Ct. 2078, 2081, 124 L.Ed.2d 182], italics original.)" (*People v. Quartermain* (1997) 16 Cal.4th 600, 621; accord *People v. Neal* (2003) 31 Cal.4th 63, 86.)

The prosecution introduced no affirmative evidence other than exhibit 32 to show that defendant was not the registered owner of the firearm. Yet the Attorney General contends that exhibit 32 "was cumulative of other evidence from which the jury would infer the pertinent fact."[10] The "other evidence" to which he refers consists of the firearm's lack of a serial number, the presence of fingerprints of persons other than defendant and his brother on the firearm, and testimony of a gang expert that defendant was a "validated" Norteno gang member. The Attorney General asserts that "[n]o rational juror would entertain the possibility the DOJ firearms database might list a validated gang member with a juvenile strike prior as the registered owner of a handgun lacking a serial number—let alone view it as reasonable."

The Attorney General's analysis distorts the proper application of the *Chapman* standard of review. The question is not whether the jury probably would have found

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[10] The Attorney General also contends that the error was harmless because cross-examination would not have reduced the value of exhibit 32. This argument ignores the proper application of the standard of review. The question is not what hypothetically would have occurred in the absence of the error, but what actually occurred as a result of the error. Here, the error was the admission of exhibit 32.

the lack of registration allegation true in the absence of exhibit 32. The correct question is whether the admission of exhibit 32 was "unimportant in relation to everything else the jury considered on the issue in question . . . ." (*Yates, supra*, 500 U.S. at pp. 403-404.) Here, exhibit 32 expressly stated that defendant was not the registered owner of any firearm. It is inconceivable that this evidence did not play a role in the jury's determination that defendant was not the registered owner of the firearm, particularly since it was the sole evidence relied upon by the prosecutor in his argument to the jury on this point. While there was other circumstantial evidence from which the jury could have inferred that defendant was not the registered owner of the firearm, we cannot say beyond a reasonable doubt that the admission of exhibit 32 did not actually contribute to the jury's verdict.

d. Section 12025, Subdivision (b)(5)

The Attorney General claims that "[f]elony punishment on [the section 12025 count] was authorized even if exclusion of [exhibit 32] would require the reversal of the jury's finding under subdivision (b)***(6)*** of section 12025" because the jury's verdict on the section 4573 count established that section 12025, subdivision (b)***(5)*** applied here. (Italics added.) The Attorney General concludes that, "regardless of the validity of the subdivision (b)(6) finding by the jury, appellant was properly sentenced on a felony violation of [section 12025] based on section 12025, subdivision (b)(5)."

Section 12025, subdivision (a) currently has three subdivisions which describe three different acts, each of which constitutes the crime of "carrying a concealed firearm." (§ 12025, subd. (a).) Subdivision (b), which currently has seven subdivisions, contains a variety of punishment provisions. Subdivision (b)(1) provides that the offense is a felony if the defendant "previously has been convicted" of a felony. Subdivision (b)(2) provides that the offense is a felony if the firearm "is" stolen, and the defendant knew it was stolen. Subdivision (b)(3) provides that the offense is a felony if the defendant "is" an active participant in a criminal street gang.

Subdivision (b)(4) provides that the offense is a felony if the defendant "is" not in lawful possession of the firearm or "is" within the class of persons prohibited from possessing a firearm. Subdivision (b)(5) provides that the offense is alternatively punishable as either a felony or a misdemeanor (that is, the offense is a wobbler) "[w]here the person *has been convicted* of a crime against a person or property, or of a narcotics or dangerous drug violation . . . ." (§ 12025, subd. (b)(5), italics added.) Subdivision (b)(6), the subdivision that was charged in this case and which was the basis for the allegations that were placed before the jury, provides that the offense is a wobbler if the defendant "is" not listed with the Department of Justice as the registered owner of the firearm and either the firearm is loaded or both the firearm and unexpended ammunition "are" in the immediate possession of, or readily accessible to, the defendant. (§ 12025, subd. (b)(6).)

The Attorney General's argument assumes that the words "has been" in subdivision (b)(5) mean "is" and that therefore a *concurrent conviction*, rather than a *prior conviction*, satisfies subdivision (b)(5) and renders a section 12025 offense a wobbler. This argument requires us to construe the meaning of subdivision (b)(5)'s description of the circumstances under which a section 12025 offense is a wobbler.

" 'When construing a statute, we must "ascertain the intent of the Legislature so as to effectuate the purpose of the law." [Citations.] '[W]e begin with the words of a statute and give these words their ordinary meaning.' [Citation.] 'If the statutory language is clear and unambiguous, then we need go no further.' [Citation.] If, however, the language supports more than one reasonable construction, we may consider 'a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part.' [Citation.] Using these extrinsic aids, we 'select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather

than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences.'" (*People v. Sinohui* (2002) 28 Cal.4th 205, 211-212.) "Where reasonably possible, we avoid statutory constructions that render particular provisions superfluous or unnecessary." (*Dix v. Superior Court* (1991) 53 Cal.3d 442, 459.)

The language of section 12025, subdivision (b)(5) is potentially ambiguous. While the statute's reference in subdivision (b)(1) to the prior felony conviction that makes a section 12025 offense a straight felony unambiguously uses the words "*previously* has been" (§ 12025, subd. (b)(1), italics added), the reference in subdivision (b)(5) to the circumstances under which a section 12025 offense is a wobbler uses only the words "has been." The fact that the word "previously" precedes "has been" in subdivision (b)(1) and not in subdivision (b)(5) might suggest that the Legislature intended a different meaning in subdivision (b)(5) than in subdivision (b)(1). (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1117 ["Where different words or phrases are used in the same connection in different parts of a statute, it is presumed the Legislature intended a different meaning."].) On the other hand, on their own, the words "has been" ordinarily refer to a past event. (Cf. *In re Reeves* (2005) 35 Cal.4th 765, 772 ["Credit restrictions, enhancements and alternative sentencing schemes based on criminal history usually employ the past perfect tense ('has been convicted' or 'previously has been convicted') rather than the present tense ('is convicted')."].) Moreover, subdivisions (b)(2), (b)(3), (b)(4), and (b)(6) use unambiguous present tense language to describe the other circumstances under which the offense is a felony or a wobbler. Due to this potential ambiguity, we must examine the legislative history of section 12025 to determine whether it provides any clues as to whether "has been" in subdivision (b)(5) was intended to refer to a *prior* conviction or to a *concurrent* conviction.

Until 1975, section 12025 provided: "Except as otherwise provided in this chapter, any person who carries concealed upon his person or concealed within any vehicle under his control or direction any pistol, revolver, or other firearm capable of being concealed upon the person without a license to carry such firearm as provided in this chapter is guilty of a misdemeanor, and if he has been convicted previously of any felony or of any crime made punishable by this chapter, is guilty of a felony." (Stats. 1955, ch. 1520, §1, p. 2799.)

In 1975, section 12025 was amended and divided into subdivisions. Subdivision (a) concerned only the offense of carrying a firearm concealed in a vehicle, while subdivision (b) addressed the offense of carrying a firearm concealed on one's person. A subdivision (a) offense was a misdemeanor except that it was a felony if the perpetrator "has been convicted previously of any felony or of any crime made punishable by this chapter." (Stats. 1975, ch. 1161, § 2, p. 2877.) A subdivision (b) offense was a misdemeanor "except any person, having been convicted of a crime against the person, property or a narcotics or dangerous drug violation, who carries concealed upon his person any pistol, revolver, or other firearm capable of being concealed upon the person without having a license to carry such firearm as provided in this chapter is guilty of a [wobbler], and if he has been convicted previously of any felony or of any crime made punishable by this chapter, is guilty of a felony . . . ." (Stats. 1975, ch. 1161, § 2, pp. 2877-2878.)

Section 12025 was amended in 1976, 1982, and 1983, but no substantive changes were made to these provisions. (Stats. 1976, ch. 1139, § 306.5, p. 5163; Stats. 1982, ch. 136, § 8, pp. 447-448; Stats. 1983, ch. 1092, § 327, pp. 4062-4063; Stats. 1983, ch. 1129, § 2, pp. 4286-4287.)

In 1992, section 12025 was extensively amended. (Stats. 1992, ch. 1340, § 6, p. 6586.) Subdivision (a) was amended so that it contained two subdivisions. Subdivision (a)(1) described the offense of carrying a concealed firearm in a vehicle,

while subdivision (a)(2) described the offense of carrying a concealed firearm upon the person. Subdivision (b) specified the punishment for such offenses under various circumstances. Subdivision (b)(1) provided that a violation of either part of subdivision (a) was a felony "[w]here the person previously has been convicted of any felony, or of any crime made punishable by this chapter . . . ." Subdivision (b)(2) provided that, "[w]here the person violated paragraph (2) of subdivision (a) and has been convicted of a crime against the person, property, or of a narcotics or dangerous drug violation," the violation was a wobbler. Subdivisions (b)(3) and (b)(4) provided that all other violations of subdivision (a) were misdemeanors. (Stats. 1992, ch. 1340, § 6, p. 6586.)

In 1994, section 12025 was again amended. (Stats. 1994, ch. 23, § 8, p. 142.) Subdivision (b)(2) was amended so that it applied to all violations of subdivision (a), rather than just violations of subdivision (a)(2). Subdivision (b)(4) was deleted, and subdivision (b)(3) was amended to provide that all other violations of subdivision (a) were misdemeanors.

In 1996, section 12025 was amended yet again. (Stats. 1996, ch. 787, § 2, pp. 4152-4153.) Subdivision (b)(1) remained the same, but subdivision (b)(2) was renumbered as subdivision (b)(5), and subdivisions (b)(2), (b)(3), and (b)(4) were added. These new subdivisions read as they do in the current version of section 12025. Subdivision (b)(6), like the former subdivision (b)(3), provided that all other violations of subdivision (a) were misdemeanors. In 1997, section 12025 was amended to add subdivision (a)(3), which provided that a person would be guilty of the offense if he or she "[c]auses to be carried concealed within any vehicle in which he or she is an occupant any pistol, revolver, or other firearm capable of being concealed upon the person." (Stats. 1997, ch. 459, § 1, p. 2926.) Section 12025 was last amended in 1999. This amendment renumbered subdivision (b)(6) as subdivision

(b)(7) and added the current subdivision (b)(6). (Stats. 1999, ch. 571, § 2, pp. 3961-3963.)

This legislative history resolves the question of whether section 12025, subdivision (b)(5) applies to a prior conviction or instead to a concurrent conviction. The subdivision (b)(5) language "a crime against the person, property, or of a narcotics or dangerous drug violation" first appeared in section 12025 after the 1975 amendment. As it read then, the language could apply *only* to a *prior* conviction: "any person, *having been convicted* of a crime against the person, property or a narcotics or dangerous drug violation, *who carries* concealed upon his person any pistol, revolver, or other firearm capable of being concealed upon the person without having a license to carry such firearm as provided in this chapter is guilty of a [wobbler]." (Italics added.) By using the past tense to describe the conviction and the present tense to describe the offense in the very same phrase, the 1975 amendment clearly intended for the crime to be a wobbler only where a *prior conviction* for "a crime against the person, property or a narcotics or dangerous drug violation" occurred *before* the person "carries" the concealed firearm.

Although section 12025 was extensively revised in 1992, and this language was placed in a separate subdivision, the Legislature clearly did not intend to alter the meaning of this phrase when it did so. At the time of the 1992 amendments, the Legislature stated its understanding that, under the statute as it existed and as it was proposed to be amended, "[h]igher penalties are provided for carrying with a prior felony, *with a **prior** misdemeanor conviction for drugs or offenses against person or property*." (Sen. Com. on Judiciary, Rep. on Assem. Bill No. 1180 (1991-1992 Reg. Sess.) as amended July 17, 1992, p. 2, bold and italics added; Sen. Rules Com., Rep. on Assem. Bill No. 1180 (1991-1992 Reg. Sess.) as amended August 8, 1992, p. 2.) None of the subsequent amendments have altered this language.

The only case the Attorney General cites in support of his interpretation of section 12025, subdivision (b)(5) is *People v. Municipal Court (White)* (1979) 88 Cal.App.3d 206 (*White*). The complaint in *White* charged the defendant with "carrying a concealed firearm after having previously been convicted of a felony." (*White*, at p. 209.) The magistrate reduced the charge to a misdemeanor. The prosecutor claimed that the magistrate lacked the authority to do so because the defendant was charged with a straight felony. (*White*, at p. 210.) The prosecutor sought and obtained a writ from the superior court overturning the magistrate's ruling. The defendant then sought a writ from the First District Court of Appeal. He claimed that he had been charged with a wobbler rather than a straight felony violation of section 12025. (*White*, at pp. 209-210.)

At the time of *White*, the 1975 amended version of section 12025 was in effect. The First District rejected the defendant's claim that section 12025 "provides 'wobbler' status to those carrying a concealed weapon who have previously been convicted of a crime against the person, property, or a narcotics or dangerous drug violation." (*White, supra*, 88 Cal.App.3d at p. 210.) The court took note of the legislative history of the 1975 amendment of section 12025 and observed that it unambiguously supported a conclusion that a section 12025 offense was a felony if the perpetrator had a *prior* ***felony*** *conviction*. This should have ended the matter, as the defendant in *White* had been charged with committing a section 12025 offense and having a prior *felony* conviction. Nevertheless, the First District went on to conclude, without citing any support in the legislative history or the language of the statute, that "violators who have not previously been convicted of a felony or a crime made punishable by the Dangerous Weapons' Control Law, *but who* ***carried the concealed weapon in connection with*** *the perpetration of a crime against the person, property, or a narcotics or dangerous drug violation are guilty of a 'wobbler.'*" (*White*, at p. 212, bold and italics added.)

The issue in *White* was whether the defendant in that case, who had been alleged to have a *prior **felony** conviction*, was charged with a felony or a wobbler violation of section 12025. Both the statutory language and the legislative history confirmed that, when a defendant with a prior felony conviction carries a concealed firearm, he or she commits a *felony* violation of section 12025. Thus, the First District had no need to construe the meaning of the portion of section 12025 describing the circumstances under which a section 12025 offense is a *wobbler*. More importantly, the First District's conclusion regarding that language directly contradicts the plain meaning of the statutory language.

As we have already pointed out, in the 1975 amended version of section 12025, the wobbler version of the offense was described by using a past tense reference to the nonfelony conviction that triggered wobbler status and a present tense reference to the current offense in the same phrase. This language could be referring *only* to a *prior* conviction which preceded the current offense, and could *not* be referring to a *concurrent* conviction, as the First District claimed in *White*. We therefore reject this dicta in *White*.

As defendant's concurrent conviction for violating section 4573 did not render his section 12025 offense a wobbler, there is no merit to the Attorney General's contention.[11]

C. Juvenile Adjudication

Defendant contends that his prior juvenile adjudication could not constitutionally be used as a strike because there is no right to a jury trial in juvenile

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[11] Because we conclude that section 12025, subdivision (b)(5) applies only to prior convictions, we need not address defendant's contention that section 12025, subdivision (b)(5) cannot properly be applied to him as it was not pleaded in the information.

proceedings. He acknowledges that the California Supreme Court rejected this contention in *People v. Nguyen* (2009) 46 Cal.4th 1007 (*Nguyen*). Nevertheless, he "feels *Nguyen* was incorrectly decided and expects the issue to be addressed by the United States Supreme Court." He states that he "makes this argument to preserve the issue for federal review."[12] We are bound by *Nguyen* (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455), so we reject defendant's contention.

D. Section 4019

A defendant ordered to serve a jail term, either as a condition of probation or otherwise, or committed to state prison is entitled to credit against the jail or prison term for all days spent in custody prior to sentencing. (§ 2900.5, subds. (a), (c).) A defendant may also earn additional presentence credit for satisfactory performance of assigned labor (§ 4019, subd. (b)) and compliance with rules and regulations (§ 4019, subd. (c)). "'Conduct credit' collectively refers to worktime credit pursuant to section 4019, subdivision (b), and to good behavior credit pursuant to section 4019, subdivision (c). [Citation.]" (*People v. Dieck* (2009) 46 Cal.4th 934, 939, fn. 3.) Under the former version of section 4019, a defendant earned two days of conduct credit for every four actual days served in local custody. (Former § 4019, subds. (b), (c).) However, in October 2009, Senate Bill No. 18 was enacted. Among other things, amended section 4019 increased conduct credit for defendants who have no current or prior convictions for serious or violent felonies and who are not required to register as sex offenders. (§ 4019, subds. (b)(1), (c)(1).) These defendants are now eligible to

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[12] In his opening brief, defendant noted that a petition for a writ of certiorari was pending in *Nguyen*. That petition was denied by the United States Supreme Court on April 19, 2010. In his reply brief, defendant acknowledges the denial of the petition, but he maintains his belief that the United States Supreme Court "may take up the issue in the future, and therefore maintains his original argument."

earn two days of conduct credit for every two days of actual custody. (§ 4019, subds. (b)(1), (c)(1).) The amendments to section 4019 went into effect on January 25, 2010, after defendant was sentenced.[13]

Here, the trial court awarded presentence credit under former section 4019. Since defendant has no current or prior convictions[14] for serious or violent felonies and he is not required to register as a sex offender, he contends that he is entitled to additional conduct credit pursuant to amended section 4019.[15]

Section 3 states that no part of the Penal Code is "retroactive, unless expressly so declared." The California Supreme Court has interpreted section 3 "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. Alford* (2007) 42 Cal.4th 749, 753 (*Alford*).) "[I]n the absence of an express retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature or the voters must have intended a retroactive application." (*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1209 (*Evangelatos*).)

The Legislature did not expressly state which version of section 4019 should apply to cases not yet final as of its effective date. Thus, we must determine whether

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[13] Our references to section 4019 or amended section 4019 are to the version of section 4019 which took effect on January 25, 2010. Section 4019 has since been revised yet again, effective on September 28, 2010. None of our references are to this current version of section 4019.

[14] Although defendant has a prior juvenile adjudication for a serious felony, that *adjudication* does not constitute a "conviction" under amended section 4019.

[15] This issue is currently before the California Supreme Court in *People v. Brown* (2010) 182 Cal.App.4th 1354, review granted June 9, 2010, S181963.

"it is very clear from extrinsic sources" (*Evangelatos, supra,* 44 Cal.3d at p. 1209) that the Legislature intended amended section 4019 to be retroactive.

Defendant relies on an exception to the general rule of prospective application. "[A]bsent a saving clause, a defendant is entitled to the benefit of a more recent statute which mitigates the punishment for the offense or decriminalizes the conduct altogether. [Citations.]" (*People v. Babylon* (1985) 39 Cal.3d 719, 725.) This rule was first articulated in *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*). In that case, the California Supreme Court reasoned that "[w]hen the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act. It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply." (*Id.* at p. 745.)

At issue then is whether the Legislature's enactment of a statute that increases presentence credit was intended to lessen punishment within the meaning of *Estrada*.

People v. Hunter (1977) 68 Cal.App.3d 389 (*Hunter*) addressed this issue in connection with *custody* credit. In 1976, the Legislature amended section 2900.5 to provide that a defendant was entitled to custody credit for presentence custody time against a county jail sentence imposed as a condition of probation. (*Hunter*, at p. 392.) Applying *Estrada*, *Hunter* held that the amendment to section 2900.5 "must be construed as one lessening punishment," and thus applied the amended statute retroactively. (*Hunter*, at p. 393.)

People v. Doganiere (1978) 86 Cal.App.3d 237 (*Doganiere*) considered whether a subsequent amendment to section 2900.5, which entitled a defendant to section 4019 *conduct* credit against a prison term for time spent in custody pursuant to a probation order, applied retroactively. (*Doganiere*, at pp. 238-239.) The court

rejected the People's argument that custody credit is distinguishable from conduct credit because conduct credit is "designed to control *future* prison inmate behavior, encourage *future* cooperation in prison programs, and foster *future* inmate self-improvement." (*Id.* at p. 239.) *Doganiere* concluded that, "[u]nder *Estrada*, it must be presumed that the Legislature thought the prior system of not allowing credit for good behavior was too severe." (*Id.* at p. 240.)

We disagree with the reasoning in *Doganiere*. In enacting legislation to authorize conduct credit, the Legislature is not seeking to lessen punishment. Rather, "conduct credits are designed to ensure the smooth running of a custodial facility by encouraging prisoners to do required work and to obey the rules and regulations of the facility." (*People v. Silva* (2003) 114 Cal.App.4th 122, 128.)

In *In re Stinnette* (1979) 94 Cal.App.3d 800 (*Stinnette*), the court considered whether prospective application of the conduct credit statutes of the recently enacted Determinate Sentencing Act violated the petitioner's equal protection rights. *Stinnette* rejected the equal protection challenge, reasoning that the purpose of the statutes was "motivating good conduct among prisoners so as to maintain discipline and minimize threats to prison security. Reason dictates that it is impossible to influence behavior after it has occurred." (*Stinnette*, at p. 806; *People v. Guzman* (1995) 40 Cal.App.4th 691, 695 ["The purpose of Penal Code section 4019 is to encourage good behavior by incarcerated defendants prior to sentencing."].) Similarly, here, retroactive application of amended section 4019 could have no impact on a defendant's past behavior.

Since there is no "'compelling implication that the Legislature intended otherwise'" (*Alford, supra*, 42 Cal.4th at p. 753), we conclude that amended section 4019 applies prospectively rather than retroactively.

IV. Disposition

The judgment is reversed and remanded for possible retrial of the section 12025 count. If the prosecution does not elect to retry the section 12025 count, the court shall reduce it to a misdemeanor and resentence defendant.

_____
Mihara, Acting P. J.

I CONCUR:

_____
Duffy, J.

McAdams, J., Concurring and Dissenting.

I concur in parts III A, B and C of the opinion (the controlled substance count, the firearm count and the use of the juvenile adjudication) but I dissent as to part D (the application of amended Penal Code section 4019).

I dissent because I agree with the reasoning of the numerous cases that have held the amendments apply retroactively.[1] In my view, such a conclusion follows from California Supreme Court precedent. As the Court reiterated in *People v. Nasalga* (1996) 12 Cal.4th 784, "provisions of a statute that have an ameliorative effect must be given retroactive effect, even where other provisions of the same statute clearly do not have such an effect." (*Id.* at p. 796, following *In re Estrada* (1965) 63 Cal.2d 740.) I would therefore find the amendments to Penal Code section 4019 at issue here apply retroactively.

_____
McAdams, J.*

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[1] The California Supreme Court has recently granted review in several cases involving this issue, including those which have found the statute applies retroactively (*People v. Brown*, S181963; *People v. House*, S182813; *People v. Landon*, S182808) and those which found it applies prospectively only. (*People v. Rodriguez*, S181808; *People v. Hopkins*, S183724.) Several more petitions for review are pending.

*Retired Associate Justice of the Court of Appeal, Sixth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

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