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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. ANTONIO PLASCENCIA PELAYO, Defendant and Appellant.	A123042 (Solano County Super. Ct. No. FCR243938)

Appellant, Antonio Plascencia Pelayo, challenges his conviction and sentence for possession of methamphetamine for sale, possession of ecstasy for sale, and evading a police officer. He challenges the validity of a search warrant for his residence, which was based primarily on information received from confidential informants and contained in a partially sealed affidavit. Pelayo also argues that Penal Code section 654 bars his punishment for possession of both methamphetamine and ecstasy for sale. In the unpublished portion of this opinion, we find no error and affirm.

In a petition for rehearing, Pelayo argues that he is entitled to the benefit of 2009 amendments to Penal Code section 4019 which went into effect on January 25, 2010 pursuant to Senate Bill No. 18 (2009–2010 3d Ex. Sess.) (Senate Bill 18). These amendments increased the good conduct credits available to a defendant for presentence custody in a local detention facility. (Stats. 2009–2010, 3d Ex. Sess. 2009, ch. 28, § 50.) The amended statute became effective after Pelayo was sentenced, but Pelayo argues the amendments must be applied retroactively to all sentences not yet final on appeal. We granted the petition for rehearing and now conclude in the published portion of this

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

opinion that the amendments are retroactive and that Pelayo is accordingly entitled to recalculation of his presentence custody credits. We remand to the trial court to modify its sentencing order and the abstract of judgment to correctly reflect the credits to which Pelayo is entitled.

I. BACKGROUND

On June 12, 2007, the superior court issued a warrant authorizing a search of a single-family home at 375 Mountain Meadows Drive in Fairfield and the person of Pelayo for, among other items, methamphetamine and items associated with the sale of methamphetamine. In the supporting affidavit, Solano County Sheriff's Deputy Detective Dax R. West averred that he had extensive experience in narcotics trafficking investigations and arrests, and that, "Within the past ten (10) days, (S) Antonio Pelayo sold Methamphetamine to a Confidential Informant (CI#2).[1] The CI#2 confirmed with me by a photograph of Antonio Pelayo that he was the one who sold him/her Methamphetamine."[2] An Appendix A to the affidavit provided additional information in support of the warrant. West asked the court to file the appendix under seal in order to protect the confidentiality of informant identity. The court granted the request and issued the warrant.

On June 20, 2007, West observed Pelayo driving on public streets and attempted a traffic stop. Pelayo sped away and led police on an extended car chase that ended only when a police vehicle blocked Pelayo's car. After Pelayo was placed under arrest, officers searched 375 Mountain Meadows Drive pursuant to the warrant. There the officers seized almost two kilograms of methamphetamine, 52 pills containing both

[1] As discussed *post*, the detective also received information, set forth in the sealed portion of the search warrant affidavit, from another confidential informant identified as CI#1.

[2] West also stated, "I ran Pelayo through NCIC and Cal Photo to obtain a criminal history and photograph. Antonio Pelayo (DOB 072178) has been arrested for the following crimes in the past; 23152(A)/23152(B) CVC Driving Under the Influence, 23103 CVC Reckless Driving, 14601.5(A) CVC Driving with a Suspended License, 12677 H&S Possess Fireworks w/o Permit, 1320(A) PC Fail to Appear Misdemeanor Charges."

ecstasy and methamphetamine, three loaded firearms stored in three different locations in the home, a digital scale, pay/owe sheets, indicia of ownership or residence, $19,375 in U.S. currency, almost $100,000 in jewelry, three fully-paid vehicles, $11,000 in receipts for electronics, $11,000 in receipts for furniture, a $10,000 certificate of deposit, and payment records for a Las Vegas timeshare. Pelayo waived his *Miranda* rights, acknowledged ownership of the methamphetamine, and admitted that he sold methamphetamine to a select group of about four or five people.

Pelayo was charged by felony complaint, which was later amended to charge Pelayo with possession of methamphetamine and ecstasy while armed with a loaded firearm (Health & Saf. Code, § 11370.1, subd. (a); counts 1 and 2); possession of methamphetamine for sale and possession of ecstasy for sale (Health & Saf. Code, § 11378; counts 3 and 4); and evading a police officer in willful or wanton disregard for the safety of persons or property (Veh. Code, § 2800.2, subd. (a); count 5). As to count 3, it was alleged that Pelayo possessed more than one kilogram of methamphetamine within the meaning of Health and Safety Code section 11370.4, subdivision (b)(1). As to counts 3 and 4, it was alleged that the quantity of the substance possessed was an aggravating sentencing factor within the meaning of Penal Code section 1170.73, and that Pelayo was personally armed with a firearm during the commission and attempted commission of the crimes, within the meaning of Penal Code section 12022, subdivision (c). It was further alleged that counts 1 through 4 were offenses that would render Pelayo ineligible for probation if convicted except in unusual cases pursuant to Penal Code section 1203.073, subdivision (b)(2).

Pelayo moved to unseal the search warrant affidavit, to quash and traverse the search warrant, and to reveal the identity of the confidential informant. The court conducted an in camera review of Appendix A to the search warrant affidavit and concluded it supported issuance of the search warrant. The court ordered the unsealing of a portion of Appendix A that explained how West determined that 375 Mountain Meadows likely was Pelayo's residence. The court specifically declined to unseal the

details of police contacts with two confidential informants referenced in the appendix, which might disclose their identities.

The excerpt from Appendix A ordered unsealed explained that West did a "work up" on Pelayo and found two vehicles registered in his name at 375 Mountain Meadows Drive in Fairfield (a 2006 Hummer and a 2006 Chrysler), and four vehicles registered in his name at 2267 Atherton Court in Fairfield (a tan Chevrolet pickup with license plate no. 8E80904, a 2004 BIGDG motorcycle, a 1988 Ford, and a 1963 Chevrolet). The address listed on Pelayo's 2005 driver's license was 2267 Atherton Court. Pelayo owned 375 Mountain Meadows Drive, and Esperanza Zavala owned 2267 Atherton Court. The Fairfield Police Department informed West that in December 2006 they responded to an alarm call at 375 Mountain Meadows Drive and a person with the surname Pelayo was the contact person. West drove by 2267 Atherton Court and saw a car there that was registered to Zavala. At 375 Mountain Meadows Drive, the Chevrolet pickup registered to Pelayo was parked in the driveway. Another detective had observed that same pickup truck during surveillance of a narcotics transaction.

Pelayo waived his right to a preliminary hearing. Both parties waived jury trial. On September 25, 2008, following a bench trial, the court convicted Pelayo of counts 3, 4 and 5, and granted the People's motion to dismiss counts 1 and 2.

At sentencing, the court denied Pelayo's motion to strike the Health and Safety Code section 11370.4, subdivision (b)(1) allegation and grant him probation. The court sentenced Pelayo to the low term of 16 months for count 3, a consecutive eight-month term (one-third the middle term) each for counts 4 and 5, a three-year enhancement pursuant to Health and Safety Code section 11370.4, subdivision (b)(1) for count 3, and a three-year enhancement pursuant to Penal Code section 12022, subdivision (c) for count 3. A three-year enhancement pursuant to Penal Code section 12022, subdivision (c) for count 4 was stayed. The total term was eight years, eight months.

II. DISCUSSION

A. Challenges to Search Warrant

Pelayo asks this court to conduct an in camera review of the sealed portions of the search warrant affidavit to determine if they were properly sealed and whether the search warrant was supported by probable cause.

The test for determining whether an affidavit establishes probable cause for the issuance of a search warrant is a "totality-of-the-circumstances analysis." (*Illinois v. Gates* (1983) 462 U.S. 213, 238 (*Gates*); see *In re Lance W.* (1985) 37 Cal.3d 873, 896 [evidence may be suppressed only if it was seized in violation of the federal constitution].) "The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, . . . there is a fair probability that contraband or evidence of a crime will be found in a particular case." (*Gates*, at p. 238.)

When an affidavit consists in part of an informant's tip to the police, the informant's veracity, reliability and basis of knowledge are relevant considerations in the totality-of-the-circumstances test, but no single factor is determinative. (*Gates*, *supra*, 462 U.S. at p. 233.) "[A] deficiency in one [of these elements] may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability. [Citations.]" (*Ibid.*) Indicia of reliability include prior accurate reports by the informant, a lack of ulterior motives in making the report, explicit and detailed description of the alleged wrongdoing, the informant's first-hand observation of the alleged wrongdoing, and corroboration by independent police work. (*Id.* at pp. 233–234, 241.)

When the sufficiency of a search warrant affidavit is challenged on appeal, "the duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis for . . . conclud[ing]' that probable cause existed. [Citation.]" (*Gates*, *supra*, 462 U.S. at pp. 238–239, only citation omission added.) "[A]fter-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of *de novo* review. A magistrate's 'determination of probable cause should be paid great deference by reviewing courts.'

[Citation.]" (*Id.* at p. 236.) Moreover, " 'the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants.' [Citation.] This reflects both a desire to encourage use of the warrant process by police officers and a recognition that once a warrant has been obtained, intrusion upon interests protected by the Fourth Amendment is less severe than otherwise may be the case." (*Id.* at p. 237, fn. 10.)

In *People v. Hobbs*, the California Supreme Court authorized the sealing of a search warrant affidavit when necessary to protect the identity of a confidential informant, and prescribed a procedure to review the sufficiency of a sealed affidavit. (*People v. Hobbs* (1994) 7 Cal.4th 948, 971–975 (*Hobbs*).) *Hobbs* directed that "[w]hen a defendant seeks to quash or traverse a warrant where a portion of the supporting affidavit has been sealed, the relevant materials are to be made available for in camera review by the trial court. (*Hobbs, supra*, 7 Cal.4th at p. 963; see Evid. Code, § 915, subd. (b).) The court should determine first whether there are sufficient grounds for maintaining the confidentiality of the informant's identity. If so, the court should then determine whether the sealing of the affidavit (or any portion thereof) 'is necessary to avoid revealing the informant's identity.' (*Hobbs, supra*, 7 Cal.4th at p. 972.) Once the affidavit is found to have been properly sealed, the court should proceed to determine 'whether, under the "totality of the circumstances" presented in the search warrant affidavit and the oral testimony, if any, presented to the magistrate, there was "a fair probability" that contraband or evidence of a crime would be found in the place searched pursuant to the warrant' (if the defendant has moved to quash the warrant) or 'whether the defendant's general allegations of material misrepresentations or omissions are supported by the public and sealed portions of the search warrant affidavit, including any testimony offered at the in camera hearing' (if the defendant has moved to traverse the warrant). (*Id.* at pp. 975, 974.)" (*People v. Galland* (2008) 45 Cal.4th 354, 364.)

We have conducted our own in camera review of the sealed portions of Appendix A and have considered each of the issues *Hobbs* directs us to assess. We conclude the trial did not err in either its denial of Pelayo's motion to unseal the search

warrant affidavit or his request to reveal the identity of the confidential informant. We also find that the "totality of the circumstances" presented in the search warrant affidavit established a fair probability that contraband or evidence of a crime would be found in Pelayo's residence.

1. *Sufficient Grounds to Maintain Confidentiality of Informant*

Generally, disclosure of a confidential informant's identity is required only if the informant was a potential material witness on the issue of guilt in the defendant's case. (*Hobbs, supra*, 7 Cal.4th at p. 959.) In contrast, "the identity of an informant who has supplied probable cause *for the issuance of a search warrant* need not be disclosed where such disclosure is sought merely to aid in attacking probable cause." (*Ibid.*) Our review of the sealed portion of the affidavit confirms that the confidential informants mentioned therein were not material witnesses to the possession and evasion charges with which Pelayo was charged. Therefore, the trial court properly refused to disclose the informants' identities.

2. *Necessity of Sealing the Affidavit*

Because the trial court properly refused to disclose the identities of the confidential informants, the court was justified in keeping sealed any portions of Appendix A that would have disclosed the informants' identities. (See *Hobbs, supra*, 7 Cal.4th at p. 972.) The trial court determined that only part of the appendix potentially disclosed the identities of the informants, and it ordered the unsealing of other material portions of the appendix. Our review of the portion of the appendix that remains sealed confirms that disclosure of any material information contained therein might lead to identification of the informants. Therefore, we affirm the trial court's decision to keep that part of the appendix under seal.

3. *Probable Cause to Issue Search Warrant*

Having determined that much of the search warrant affidavit must remain under seal, the trial court had to "take it upon itself both to examine the affidavit for possible inconsistencies and insufficiencies regarding the showing of probable cause, and inform the prosecution of material or witnesses it requires." (*Hobbs, supra*, 7 Cal.4th at p. 973.)

The trial court concluded the affidavit on its face established probable cause, without the necessity of calling witnesses or production of other evidence. Our review confirms that the sealed and unsealed portions of the affidavit, without more, provided a substantial basis for the magistrate's probable cause determination. Information provided by an initial informant about a drug sale was directly corroborated by the police. Information provided by the second informant identifying Pelayo as the drug seller was substantially corroborated by the police. Moreover, the affidavit included an expert opinion that Pelayo was an upper-midlevel dealer and this opinion is supported by information provided by one informant and uncovered by the police investigation. This information established probable cause to believe Pelayo was a drug dealer, and a magistrate may reasonably conclude that evidence of drug dealing is likely to be found in a drug dealer's residence. (See *People v. Pressey* (2002) 102 Cal.App.4th 1178, 1184 [listing cases].) Therefore, the affidavit established probable cause to believe drugs would be found at Pelayo's residence and thus to issue the search warrant.

4. *Material Misrepresentations*

Our review of the sealed portion of the affidavit discloses no basis to suspect that it contains knowingly or recklessly false representations material to the finding of probable cause. (See *Hobbs*, *supra*, 7 Cal.4th at p. 974.)

In conclusion, we affirm the trial court's decisions to maintain the confidentiality of the informants mentioned in the search warrant affidavit, to keep a portion of the affidavit under seal to maintain that confidentiality, to affirm the magistrate's finding of probable cause to issue the warrant, and to deny Pelayo's motions to traverse the warrant and suppress the evidence seized pursuant to the warrant. Because these are Pelayo's only challenges to his conviction, we affirm his conviction.

B. Penal Code Section 654[3]

Pelayo argues that section 654 bars imposition of sentences for both counts charging possession for sale under Health and Safety Code, section 11378—count 3

[3] All further code references are to the Penal Code unless otherwise indicated.

(possession of methamphetamine) and count 4 (possession of ecstasy). Pelayo notes that the pills found in his possession contained both ecstasy and methamphetamine and argues he cannot be multiply punished for the single act of possessing these pills, citing *In re Adams* (1975) 14 Cal.3d 629. This argument, however, ignores the fact that crystal methamphetamine was also found in Pelayo's possession.

Section 654 prohibits multiple punishment for an "act or omission which is made punishable in different ways by different provisions of this Code" or by the penal provisions of other codes, including the Health and Safety Code. (*In re Adams, supra*, at p. 633; see § 654.) "If one offense is necessarily included within another offense, section 654 bars punishment for both offenses. [Citation.] . . . [¶] The reach of section 654 is not limited, however, to necessarily included offenses. [Citation.] By its terms, the section forbids multiple punishments for the commission of a single 'act' or 'omission.' The 'act' necessary to invoke section 654 need not be an act in the ordinary sense that it is a separate, identifiable, physical incident, but may be 'a course of conduct which violates more than one statute and comprises an indivisible transaction punishable under more than one statute within the meaning of section 654. The divisibility of a course of conduct depends upon the intent and objective of the actor, and if all the offenses are incident to one objective, the defendant may be punished for any one of them but not for more than one.' [Citation.]" (*In re Adams*, at p. 633–634.) "[T]he principal inquiry [is:] was the defendant's criminal objective single or multiple?" (*Id.* at p. 635; see also *People v. Latimer* (1993) 5 Cal.4th 1203, 1216 [criticizing but reaffirming this "intent and objective" interpretation of § 654].)

In *In re Adams*, the Supreme Court held that the petitioner was improperly sentenced for five counts of transporting drugs based on the single act of delivering an attaché case and several plastic bags containing five different types of drugs to another person's car, since the "petitioner's simultaneous transportation of the various drugs in his possession was clearly motivated by the single objective of delivering them to [a single person]." (*In re Adams, supra,* 14 Cal.3d at p. 632, 635.) The Court distinguished cases holding that simultaneous *possession* of different types of drugs may properly be

multiply punished, and commented, "In each of the[se] drug possession cases, the defendant's possession may or may not have been motivated by a single intent and objective, for one may possess drugs for a variety of reasons." (*In re Adams, supra,* 14 Cal.3d at p. 635.)

"Whether a course of criminal conduct violating more than one penal statute is committed with a single criminal intent or with multiple criminal objectives is ordinarily a question of fact for the trial court, whose implied finding of multiple criminal intent will be upheld if supported by substantial evidence." (*People v. Green* (1988) 200 Cal.App.3d 538, 543–544.) The court below presided over Pelayo's bench trial and thus was well acquainted with the evidence against him. That evidence showed that Pelayo possessed about two kilograms of methamphetamine in a white crystalline form, stored in large plastic bags, and also possessed 52 pink pills containing both methamphetamine and ecstasy. The trial court implicitly found that Pelayo had separate criminal objectives for possessing the methamphetamine powder and the ecstasy/methamphetamine pills, and that finding is supported by the record. The trial court could easily infer from the evidence that Pelayo had separate criminal objectives to sell crystal methamphetamine and to sell the pills that contained a combination of ecstasy and methamphetamine. Moreover, Pelayo admitted to police that he sold drugs to several people, and evidence uncovered in his home (three firearms stored at three locations, a digital scale with white residue, and pay/owe sheets) supported an inference that Pelayo conducted an ongoing, large-scale drug sales operation serving multiple customers.

In contrast to a single act of transportation and delivery of multiple types of controlled substances, " '[t]he act of possession cannot be conceptualized as a single 'act' covering possession of two kinds of illicit drugs.' [Citation.]" (*In re Adams, supra,* 14 Cal.3d. at p. 635, only citation omission added.) Possession of two types of drugs in large amounts supports the inference that Pelayo intended multiple sales to different customers. "Under [such] circumstances, section 654 does not prohibit punishment for each drug offense." (*People v. Briones* (2008) 167 Cal.App.4th 524, 529–530.)

Pelayo also argues that he cannot be multiply punished for the possession of methamphetamine in both power and pill form, citing *People v. Schroeder* (1968) 264 Cal.App.2d 217 (*Schroeder*). *Schroeder*, however, held that a defendant cannot be multiply *convicted* of the possession of different forms of the same drug. (*Id.* at p. 228.) Pelayo was not multiply convicted for possession of methamphetamine and his reliance on *Schroeder* is misplaced. The court in *Schroeder* further expressly acknowledged that "possession of narcotics under different classifications of the Health and Safety Code may be charged and punished as separate crimes notwithstanding a simultaneous possession constituting but one transaction." (*Ibid*.) For the reasons already discussed, he was properly punished for both possession of ecstasy and possession of methamphetamine.

C. Retroactivity of 2009 Amendments to Section 4019

We filed an opinion denying Pelayo's appeal on February 16, 2010. On February 22, 2010, before our opinion became final, Pelayo filed a petition for rehearing seeking the benefit of 2009 amendments to section 4019, which took effect in January 2010. Those amendments, with certain exceptions not applicable here, increase the good conduct credits a defendant can receive for presentence custody. Pelayo argues that the amendments, which became effective in January 2010, must be retroactively applied to his case under *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*). We granted the petition for rehearing, vacated our previously-filed opinion, and ordered supplemental briefing from both parties.[4]

Since Pelayo's petition was filed, the issue of whether the recent amendments to section 4019 apply retroactively, or only prospectively, has been addressed in a number of published opinions. The Fifth District ruled in *People v. Rodriguez* (2010)

[4] On March 1, 2010, we asked the People to file a response to Pelayo's petition, and asked Pelayo to brief a procedural issue. After receiving the parties' briefs in response to this order, we requested supplemental briefing on a recently published decision and the legislative history of the amendments to section 4019. Pelayo filed a timely supplemental brief in response to this order. The People received leave to file a late opposition.

183 Cal.App.4th 1 (*Rodriguez*), that the amendments do not apply retroactively. The Third District, Second District (Divisions One and Six), and our First District (Division Two) have held that the amendments are retroactive. (*People v. Brown* (2010) 182 Cal.App.4th 1354 (*Brown*); *People v. House* (2010) 183 Cal.App.4th 1049; *People v. Delgado* (Apr. 29, 2010, B213271) __ Cal.App.4th __ [2010 Cal.App. Lexis 600]; *People v. Landon* (Apr. 13, 2010, A123779) __ Cal.App.4th __ [2010 Cal.App. Lexis 517] (*Landon*).) We join the majority view and also hold the amendments apply retroactively, entitling Pelayo to additional presentence custody credit.

1. *Factual Background*

Pelayo was sentenced October 21, 2008, to seven years in state prison. At sentencing, the trial court determined that Pelayo had spent 490 days in presentence custody and that he was therefore entitled to 244 days of credit under the then-current version of section 4019, which provided for two days of credit for every four days of custody unless the inmate failed to perform assigned work or abide by the facility's reasonable rules and regulations. (Former § 4019, subds. (a)(4), (b), (c), (f), as amended by Stats. 1982, ch. 1234, § 7.) Effective January 2010, section 4019 provides for up to two days of credit for every *two* days of custody under the same conditions (with exceptions not relevant here). (§ 4019, subds. (a)(4), (b)(1), (c)(1), (f).) If sentenced under the current version of section 4019, Pelayo would be entitled to another 246 days of credit. (*Ibid.*)

2. *Procedural Issues*

An argument that an ameliorative amendment to a penal statute applies to a case not yet final on appeal is not subject to forfeiture or waiver. If retroactive, a sentence imposed under the former law is unauthorized, and an unauthorized sentence is subject to correction at any time, even on collateral review in a habeas action. (*People v. Nasalga* (1996) 12 Cal.4th 784, 789 & fn. 4 (*Nasalga*) [amendment effective before sentencing but no objection was made in trial court; no waiver or forfeiture because sentence was unauthorized]; see also *Estrada*, *supra*, 63 Cal.2d at pp. 742, 750 [amendments effective after crime committed but before conviction and sentencing; issue raised in habeas

petition seeking release on parole was cognizable because writ challenged unauthorized sentence].) In their supplemental brief, the People concede that Pelayo can raise this issue for the first time in a petition for rehearing and do not object to our deciding the petition on the merits. (See also *People v. Acosta* (1996) 48 Cal.App.4th 411, 427 [§ 1237.1, which generally prohibits an appeal challenging the calculation of presentence custody credits unless the defendant has first raised the issue in the trial court, does not apply when other issues are litigated on appeal]; Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2009) ¶¶ 12:25 to 12:26, p. 12-5 (rev. #1, 2008) [jurisdictional issues are not forfeited because they were untimely raised on appeal]; *In re Harris* (1993) 5 Cal.4th 813, 842 [imposition of unauthorized sentence is act in excess of court's jurisdiction].)

3. *Retroactivity of Penal Statutes in General*

Section 3 provides that "[n]o part of [the Penal Code] is retroactive, unless expressly so declared." (§ 3.) "That section simply embodies the general rule of construction . . . that when there is nothing to indicate a contrary intent in a statute it will be presumed that the Legislature intended the statute to operate prospectively and not retroactively." (*Estrada, supra,* 63 Cal.2d at p. 746.) The rule, however, "is not a straitjacket" and "should not be followed blindly in complete disregard of factors that may give a clue to the legislative intent" even if the Legislature has not expressly stated that a statute should apply retroactively. (*Ibid.*) In *Estrada*, the Court considered the particular circumstance of a penal statute that lessens the punishment for a crime but does not include an express statement that the statute was to apply retroactively. (*Id.* at pp. 743–744.) In that situation, the Court concluded, the inevitable inference is "that the Legislature must have intended, and by necessary implication provided, that the amendatory statute should prevail. When 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. . . . This intent seems obvious, because to hold otherwise would be to conclude that the Legislature was motivated by a desire for vengeance, a conclusion not permitted in view of modern theories of penology," which instruct that punishment is directed toward deterrence, incapacitation, and rehabilitation, but not "punishment for its own sake." (*Id.* at pp. 744–745.) Accordingly, "where the amendatory statute mitigates punishment and there is no saving clause [requiring only prospective effect], the rule is that the amendment will operate retroactively so that the lighter punishment is imposed." (*Id.* at p. 748.) That is, it will apply to all judgments of conviction that are not yet final on direct review. (*Id.* at p. 744.)

In 1996, the Supreme Court expressly reaffirmed the *Estrada* rule. (*Nasalga, supra,* 12 Cal.4th at p. 792, fn. 7.) In a prior case, the Court had suggested that the rationale of *Estrada* had been undermined by further developments in penology in this state. (*In re Pedro T.* (1994) 8 Cal.4th 1041, 1045, fn. 1, citing § 1170, subd. (a)(1) ["Legislature finds and declares that the purpose of imprisonment for crime is punishment"].) In *Nasalga*, however, the Court rejected an invitation to reconsider *Estrada* in light of this change in penological theory. "In the 31 years since this court decided *Estrada*, . . . the Legislature has taken no action, as it easily could have done, to abrogate *Estrada*."[5] (*Nasalga,* at p. 792, fn. 7.) In short, in *Nasalga* the Court reaffirmed the *Estrada* rule on the ground of legislative acquiescence, regardless of the continuing persuasiveness of the *Estrada* rationale. (Cf. *People v. Meloney* (2003) 30 Cal.4th 1145, 1161 (*Meloney*) ["[when] a statute has been construed by judicial decision, and that construction is not altered by subsequent legislation, it must be presumed that the Legislature is aware of the judicial construction and approves of it"].) After *Nasalga*, it

[5] Notably, during that 31-year period the Supreme Court had repeatedly followed and applied *Estrada*. (See, e.g., *People v. Francis* (1969) 71 Cal.2d 66, 75–76; *People v. Rossi* (1976) 18 Cal.3d 295, 298–300; *People v. Chapman* (1978) 21 Cal.3d 124, 126–127; *People v. Babylon* (1985) 39 Cal.3d 719, 721–722; *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 300–301.)

is no longer open to debate whether the *fact* that the Legislature enacted a statute that mitigates punishment supports an inference that the Legislature *intended* the statute to apply retroactively. (*Nasalga*, at p. 792, fn. 7.)

In light of *Estrada* and *Nasalga*, we agree with *Brown*'s statement that there are "two alternate presumptions" that govern the question whether a penal amendment will operate retroactively: "If the amendment is a reduction in punishment, *Estrada* requires that we presume retroactive application, at least as to cases not yet final on the effective date. [Citation.] For all other amendments, section 3 requires that we presume prospective application. However, in either case, the presumption may be rebutted by evidence demonstrating a contrary intent." (*Brown, supra,* 182 Cal.App.4th at p. 1361.)

4. *Retroactivity of Statutes Increasing Custody Credits*

In at least four prior decisions long predating the current amendments, courts of appeal have held that the *Estrada* rule applied to amendments increasing the credits a defendant could receive for presentence custody. (*People v. Hunter* (1977) 68 Cal.App.3d 389, 391–393 (*Hunter*); *People v. Sandoval* (1977) 70 Cal.App.3d 73, 87–88 (*Sandoval*); *People v. Doganiere* (1978) 86 Cal.App.3d 237, 238–240 (*Doganiere*); *People v. Smith* (1979) 98 Cal.App.3d 793, 798–799 (*Smith*).) As far as we are aware, no published decisions have held to the contrary. In *Hunter*, the issue was whether amendments to section 2900.5, which allowed credit for actual time spent in presentence custody against sentences imposed as a condition of probation, applied retroactively to probationary sentences imposed prior to the effective date of the amendments. (*Hunter*, at p. 391.) Following *Estrada*, the court held the amendments applied retroactively to judgments that were not yet final on the effective date of the new law. (*Ibid.*) *Sandoval* agreed with and followed *Hunter* on the same issue. (*Sandoval*, at pp. 87–88.)

In *Doganiere*, the issue was the retroactivity of amendments to section 2900.5 that authorized *conduct* credit (pursuant to § 4019) for time that had been served in jail as a condition of probation against a sentence later imposed after a violation of probation. (*Doganiere, supra,* 86 Cal.App.3d at pp. 238–239.) Following *Estrada* and *Hunter*, the court held the amendments were retroactive. (*Id.* at pp. 239–240.) In *Smith*, the court

followed *Estrada* and *Doganiere* and held that 1979 amendments to section 4019 applied retroactively. (*Smith, supra,* 98 Cal.App.3d at p. 799.) In *Doganiere*, the court specifically rejected an argument that the amendments should not apply retroactively because conduct credits were an incentive for future inmate behavior, a goal that could only be accomplished through prospective application. (*Doganiere,* at pp. 239–240.) "It appears to us that in applying the principles of *Estrada*, as indeed we must, the Legislature simply intended to give credit for good behavior and in so doing, dangled a carrot over those who are serving time. It would appear to be fair, just and reasonable to give prisoner A, who has been a model prisoner and by reason thereof served only five months of his six-month sentence, credit for the full six months if we are going to give credit for the full six months to prisoner B, who is recalcitrant, hard-nosed, and spent his entire time violating the rules of the local jail." (*Ibid.*) We note that *Estrada* itself implicitly rejected a similar argument made by the dissent in that case, that retroactive application of a lessened criminal penalty undermines the deterrent effect of penal statutes. (See *Estrada*, *supra*, 63 Cal.2d at p. 753 (dis. opn. of Burke, J.).) *Doganiere* concluded, "Under *Estrada*, it must be presumed that the Legislature thought the prior system of not allowing credit for good behavior was too severe." (*Doganiere,* at p. 240.) Again, under *Nasalga*, the legitimacy of that inference is no longer open to debate. (*Nasalga*, *supra*, 12 Cal.4th at 792, fn. 7.)

The People contend that the reasoning of *Doganiere* is unsound, since the public purpose of good conduct statutes is to provide effective incentives for good behavior, and that this purpose can only be furthered by prospective application of additional credits. "Reason dictates that it is impossible to influence behavior after it has occurred." (*In re Stinnette* (1979) 94 Cal.App.3d 800, 806 (*Stinnette*); see also *Rodriguez*, *supra*, 183 Cal.App.4th at p. 8.) *Stinnette* considered an amendment to section 2931 under the Determinate Sentencing Act (DSA), which allowed prisoners to earn conduct credits but restricted application of the amendment to time served after the effective date. (*Stinnette*, *supra,* at pp. 803–804.) The issue was whether the express prospective application of the statute violated equal protection. (*Id.* at p. 804.) The court concluded that it did not

because there was a rational basis for treating those who had already begun serving their sentences differently from those who began serving their sentences after the effective date. (*Id.* at pp. 805–806.) Unlike *Stinnette*, the amendment to section 4019 at issue here does not specify the Legislature's intent regarding its retroactive or prospective application. We agree with our colleagues in *Landon* and *Brown* that *Stinnette* is not helpful in determining the Legislature's intent when amending section 4019. (*Landon, supra,* __ Cal.App.4th__ [2010 Cal.App.Lexis 517, at p. 20]; *Brown, supra,* 182 Cal.App.4th at p. 1362.)

The Legislature, which is presumed to have been aware of the *Hunter*/*Doganiere* case law, "has taken no action, as it easily could have done, to abrogate" these decisions in the more than 31 years since the last of them was decided. (Cf. *Nasalga, supra,* 12 Cal.4th at p. 792, fn. 7.) Moreover, the Legislature twice amended section 4019, in 1982 and 2009, without expressly providing that the amendments would apply prospectively only. (Stats. 1982, ch. 1234, § 7; Stats. 2009–2010, 3d Ex. Sess. 2009, ch. 28, § 50.) On these facts, we may infer that the Legislature has acquiesced in *Doganiere.* (See *Meloney, supra,* 30 Cal.4th at p. 1161.)

5. *Legislative Intent in 2009 Amendments of Section 4019*

As the People acknowledge, the Legislature, in enacting the amendments to section 4019, did not expressly declare its intent in doing so. Pelayo asserts that an intent to retroactively apply the amendments can be discerned from the statement that Senate Bill 18 was enacted to "address[] the fiscal emergency declared by the Governor" (Sen. Bill 18, § 62) and that earlier release of prisoners would foster that purpose. However, the legislative intent at issue "is not the *motivation* for the legislation" but rather "the Legislature's intent concerning whether the [enactment] should apply prospectively only." (*Nasalga, supra,* 12 Cal.4th at p. 795). The Third Appellate District in *Brown* found that the statute's purpose of saving state funds by reducing prison population while at the same time minimizing security risk is at least as consistent with retroactive as with prospective application of the amendments to section 4019. (*Brown, supra,* 182 Cal.App.4th at pp. 1363–1364.) We agree.

Pelayo also contends that the express use of a saving clause in other statutes amended by the same legislation (Sen. Bill 18, § 41[6]; § 2933.3, subd. (d) [providing additional custody credits for prison inmate firefighting training or service only for those eligible after July 1, 2009]) compels a conclusion that the Legislature intended retroactivity for amended section 4019. The Legislature's inclusion of a saving clause in the amendment to section 2933.3, but not in the amendments to section 4019, supports an inference that the Legislature had a different intent with respect to the retroactive or prospective application of the two provisions. (Cf. *Fairbanks v. Superior Court* (2009) 46 Cal.4th 56, 62 ["use of differing language in otherwise parallel provisions supports an inference that a difference in meaning was intended"].) The People urge that we can divine a contrary legislative purpose for only prospective application from the fact that the amendment to section 2933.3, subdivision (d) *was* expressly made partially retroactive, and the Legislature *failed* to do so here. The Fifth Appellate District in *Rodriguez* agreed that the inclusion of an express provision for retroactive application in one instance and its absence from the section amending section 4019 undermines any inference of retroactive intent with respect to section 4019. (*Rodriguez, supra,* 183 Cal.App.4th at p. 3.) We think that the Legislature's use of the phrase "shall *only* apply" in amending section 2933.3 (italics added), however, suggests an intent to *limit* the provision's retroactive application, rather than *extend* the provision's otherwise prospective application retroactively, and respectfully disagree with the conclusion in *Rodriguez*.

Pelayo further argues that we can look to the Legislature's explicit recognition of inevitable delays in implementation of new custody credit calculations by the Department of Corrections (Sen. Bill 18, § 59) as evidence that the Legislature contemplated retroactive application of such credits. Section 59, an uncodified provision of Senate Bill 18, provides: "The Department of Corrections and Rehabilitation shall implement

[6] "The credits authorized in subdivisions (b) and (c) shall only apply to inmates who are eligible after July 1, 2009." (Stats. 2009–2010, 3d Ex. Sess. 2009, ch. 28, § 41.)

the changes made by 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 the 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." (Stats. 2009–2010, 3d Ex. Sess. 2009, ch. 28, § 59.) The Third Appellate District in *Brown* found that, while ambiguous, this section does tend to support an inference that the Legislative intended the provisions affecting custody credits to have retroactive effect, and we concur. (*Brown, supra,* 182 Cal.App.4th at pp. 1364–1365; see also *Landon, supra*, 2010 Cal.App.LEXIS 517, at pp. 22–23.)

Ultimately, however, we need not attempt any Delphic insights into legislative purpose to conclude that, in the absence of clear affirmative indications that the Legislature intended the amendments to section 4019 to have prospective application only, we must apply the *Estrada* and *Doganiere* presumption that the amendments are retroactive as to all sentences not yet final on direct appeal at the time the amendments went into effect. We find no clear expression of such an intent and thus hold that the amendments must be applied retroactively.

6. *Conclusion*

We hold that Pelayo is entitled to the benefits of the 2009 amendments to section 4019. Because we reach this conclusion, we have no need to address the argument that equal protection rights would be violated if the amendments were given only prospective application.

III. DISPOSITION

The judgment is reversed as to the calculation of presentence custody credits only. On remand, the trial court shall revise its sentencing order and the abstract of judgment to reflect that Pelayo earned 980 days of presentence custody credits pursuant to

section 4019 and forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation.

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Bruiniers, J.

We concur:

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Jones, P. J.

_____
Simons, J.

Superior Court of Solano County, No. FCR243938, Donna Stashyn, Judge.

Syda Kosofsky, under appointment by the Supreme Court, for Defendant and Appellant.

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