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CERTIFIED FOR PARTIAL PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JOSE LUIS RODRIGUEZ, Defendant and Appellant.	F057533 (Stanislaus Super. Ct. Nos. 1226035, 1242767) **ORDER MODIFYING OPINION AND DENYING REHEARING [NO CHANGE IN JUDGMENT]**

THE COURT

It is ordered that the opinion filed herein on March 1, 2010, be modified as follows:

1. On page 7, immediately following the words "Senate Bill 18" in the first sentence of the second full paragraph "(SB 18)" is to be inserted.

2. On page 10, the first full paragraph, which begins with the word "Thus," is deleted and the following paragraphs are inserted in its place:

> In his petition for rehearing, appellant asserts there are certain "pertinent factors," not previously discussed, which establish that the Legislature intended the 2010 amendment to section 4019 to operate retroactively.

First, while acknowledging that the Legislature did not include a saving clause in the amendment to section 4019 expressly indicating the intent that the amendment apply prospectively only, appellant argues that the Legislature was aware it could have done so, and that from the Legislature's failure to expressly declare that the amendment operate prospectively only, we should infer that the Legislature intended the amendment to apply retroactively. This argument suggests that whenever the Legislature fails to include an express indication of prospective-only application, it intends retroactive application. Thus, appellant argues, in effect, that there is a presumption in favor of retroactive application. This proposition, of course, is directly contrary to section 3. As indicated above, there must be a "'clear and compelling implication'" that the Legislature intended the amendment to apply retroactively. (*People v. Alford*, *supra*, 42 Cal.4th at p. 753.) That the Legislature failed to expressly indicate its intent that the statute not apply retroactively does not meet this test.

Moreover, we note that one of the examples appellant cites in support of his point that the Legislature was aware it could make the amendments to section 4019 operate prospectively, but not retroactively, supports the inference that the court did not intend the amendment to apply retroactively. In section 41 of SB 18, the Legislature amended section 2933.3 to allow for increased credit for certain inmates who have completed training as inmate firefighters. (Stats. 2009-2010, 3rd Ex. Sess., ch. 28, § 41.) Subdivision (d) of section 2933.3 (section 2933.3(d)), as amended, provides: "The credits authorized in subdivisions (b) and (c) shall apply only to inmates who are eligible after July 1, 2009." Appellant characterizes this subsection as a "saving clause [that] limits the extent of [section 2933.3(d)'s] retroactive application." (Italics omitted.) However, it is also an express provision that particular credit-increasing provisions of SB 18 are to apply retroactively.

Thus, the Legislature demonstrated in section 2933.3(d) its awareness that it could provide expressly for retroactive application of a statute affecting presentence credit. That the Legislature failed to provide a similar express provision of retroactivity elsewhere in the same legislative enactment supports the inference that the omission was deliberate, thereby indicating the intent that the amendment to section 4019 *not* apply retroactively.

Next, appellant calls our attention to Section 59 of SB 18 (section 59), which provides as follows:

"The Department of Corrections and Rehabilitation shall implement the changes made to this act regarding time credits in a reasonable time. However, in light of limited case management resources, it is expected that there will be some delays in determining the amount of additional time credits to be granted against inmate sentences resulting from changes in law pursuant to this act. An inmate shall have no cause of action or claim for damages because of any additional time spent in custody due to reasonable delays in implementing the changes in the credit provisions of this act. However, to the extent that excess days in state prison due to delays in implementing this act are identified, they shall be considered as time spent on parole, if any parole period is applicable." (Stats. 2009, 3d Ex. Sess., ch. 28, § 59.)

Appellant argues that the Legislature would not have been concerned with "delays in determining the amount of additional time credits to be granted against inmate sentences resulting from changes in law pursuant to this act" or lawsuits based on delays, and would not have directed the Department of Corrections and Rehabilitation to "implement the changes made to this act," unless it intended the amendment to section 4019 to apply retroactively.

We agree that section 59 evinces recognition that *some changes* in the act regarding time credit are to be applied retroactively. However, section 4019 is not the only statute affecting presentence credit amended by SB 18. As indicated above, section 2933(d) expressly provides that particular credit-increasing provisions of SB 18 are to apply retroactively. Section 59 applies to changes in credit under these provisions.

Section 59 is not specific as to which changes in credit implemented by SB 18 is to apply. Appellant argues that as a result of the Legislature's failure to specify the changes to which section 59 applies, "there is no suggestion that section 59 was intended to apply to one or more of SB 18's changes regarding credits, but not others." But neither is there any suggestion that section 59 was meant to apply to any changes other than ones which the Legislature, as in section 2933(d), expressly provided are to be applied retroactively. Section 59 is, at best, ambiguous on this point. And such ambiguity does not constitute an "express[]" declaration of retroactivity within the meaning of section 3.

Appellant also challenges the portion of our opinion in which we distinguish *Estrada*. *Estrada*, he suggests, stands for the broad proposition that a statute that has the effect of reducing punishment and does not contain an express declaration of prospective-only application is to be given retroactive effect. Increasing conduct credit, he argues, decreases punishment, just as the statute at issue in *Estrada*, which reduced the penalty for a specific offense, decreased punishment. Any purported distinction between these two forms of reduction of punishment, he argues, is "artificial" and "improper."

The point that increasing credit reduces time in prison is, of course, indisputable. Where we disagree with appellant is that, in our view, because of factors present here but not in *Estrada*, the fact that the amendment to section 4019 will reduce prison time for qualifying felons does not lead inevitably to the conclusion, as it did in *Estrada*, that the Legislature intended the amendment to apply retroactively.

As demonstrated above, the single "obvious" conclusion to be drawn from the enactment of the punishment-reducing statute at issue in *Estrada* was that the Legislature had determined that "its former penalty was too severe and that a lighter punishment is proper for the commission of the prohibited act." (*Estrada*, *supra*, 63 Cal.2d at p. 745.) From this conclusion it followed that the Legislature intended retroactive application. But to reiterate our earlier points: Where, as here, the amendatory statute affects conduct credit and was enacted for the express purpose of addressing the state's fiscal crisis, factors not present in *Estrada*, the picture presented of the Legislature's intent is murky at best. Because of these factors, and because in another section of SB 18 the Legislature expressly declared the operation of a credit-increasing provision (§ 2933.3(d)) to be retroactive but did not do so with respect to the amendment to section 4019, it is far from obvious, unlike in *Estrada*, that the Legislature intended the amendment to section 4019 to apply retroactively. Indeed, because the purpose of conduct credit is to influence behavior and that incentive obviously cannot affect behavior that has already occurred, the inference is strong that the Legislature did not intend the amendment to operate retroactively.

Our task is to determine whether the section 3 presumption of non-retroactivity has been rebutted. Under the circumstances here, there is no "'clear and compelling implication'" (*People v. Alford*, *supra*, 42 Cal.4th at p. 753) of

retroactivity. Therefore, applying section 3, we conclude the Legislature did not intend the amendment to apply retroactively.

There is no change in the judgment.

Appellant's petition for rehearing is denied.

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ARDAIZ, P.J.

WE CONCUR:

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LEVY, J.

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KANE, J.