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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. CHRISTOPHER OLAGUE, Defendant and Appellant.	H036888 (Santa Clara County Super. Ct. No. 211361)

Defendant Christopher Olague was sentenced to state prison after pleading guilty to a charge of conspiracy to sell methamphetamine. On appeal he contends that (1) the court should have stricken, rather than stayed, a sentence enhancement under Penal Code section 667.5 (§ 667.5) for having served a prior prison term, and (2) he is entitled to an additional 370 days of presentence custody credits under post-conviction amendments to the governing statute. Respondent concedes the first point, and we will direct a corresponding amendment to the judgment. In all other respects we will affirm.

BACKGROUND

On December 4, 2008, the grand jury of Santa Clara County presented a 42-count indictment alleging that defendant and 19 others committed numerous gang-related offenses. Defendant was named only in the first two counts, which charged participation in a criminal street gang (Pen. Code, § 186.22, subd. (a)) and conspiracy to sell methamphetamine (Pen. Code, § 182, subd. (a)(1); Health & Saf. Code, § 11379, subd. (a)). It was further alleged as an enhancement that he had committed the offense to

promote criminal gang conduct. (Pen. Code, § 186.22, subd. (b)(1)(A).) Also charged were four enhancements arising from a single previous robbery conviction: a doubling of the base term (Pen. Code, §§ 667, subd. (e)(1), 1170.12, subd. (c)(1)); an additional five years for being convicted of a serious felony with a serious-felony prior (*id.*, §§ 667, subd. (a)); an additional three years for being sentenced on a violent felony after serving a prior prison term for a violent felony (*id.*, § 667.5, subd. (a)); and an additional one year for being sentenced to prison after serving a prior prison term (*id.*, § 667.5, subd. (b)).

During jury selection, defendant changed his plea on the second count to no contest pursuant to an agreement under which he would receive a sentence of nine years in prison and would be permitted to bring a motion to strike his strike prior so as to earn credit in state prison at the rate applicable to strike-free inmates. The prosecutor described the agreement as contemplating, in relevant part, defendant's admission of the gang enhancement as well as "his strike prior, his Prop 8 prior, and his two prison priors." Defense counsel took exception to the last phrase, stating, "I do believe Mr. Olague has a single prison prior." The prosecutor agreed "that there's only one prison prior alleged as to Mr. Olague."

Defendant brought a motion to strike the strike prior, which the trial court denied. On February 28, 2011, the court imposed a sentence of nine years, consisting of four years on the conspiracy charge and five years under Penal Code section 667, subdivision (a). In addition the court imposed, but stayed, an enhancement under Penal Code section 667.5, subdivision (b). The court allowed credit for presentence confinement of 718 days actual custody plus 358 days conduct credit.

Defendant brought this timely appeal limited to "the sentence or other matters occurring after the plea that do not affect the validity of the plea." (See Cal. Rules of Court, rule 8.304(b).)

DISCUSSION

I. *Enhancement*

Citing *People v. Jones* (1993) 5 Cal.4th 1142, 1152-1153, defendant contends that the sentence enhancement under Penal Code section 667.5, subdivision (b), should have been stricken rather than stayed. That was indeed the procedure prescribed there where enhancements were charged, based on the same prior conviction, both for the conviction itself and for a prison sentence served pursuant to it. Respondent concedes the error, and the concession is well taken. (See *People v. Perez* (2011) 195 Cal.App.4th 801, 805.) Accordingly, we will direct an amendment of the judgment to strike the challenged enhancement.

II. *Pre-Sentence Credits*

In a supplemental brief defendant seeks the benefit of amendments to Penal Code sections 4019 and 2933 which had the effect of increasing conduct credit for presentence confinement with respect to persons convicted of serious or violent felonies. He acknowledges that under the law in effect at the time of sentencing, he was "only entitled to six day's credit for every four days served." This was because, while defendants generally were entitled to one day of conduct credit for every day actually served (i.e., two days total credit per day served), those who had sustained prior convictions for serious felonies—as defendant had—were limited to two days conduct credit for four days actually served (six days total credit for each four days served). (Former Pen. Code, §§ 2933, subd. (e)(3), 4019, subd. (f), as enacted by Stats. 2009 3d Ext. Sess., ch. 28, §§ 38, 50.) On October 1, 2011, however—seven months after he was sentenced—this disqualification was eliminated, so that persons like defendant, who had prior serious felony convictions but were not presently being sentenced for a serious felony, would earn presentence confinement credits at the higher one-for-one rate. (Pen. Code, §§ 2933, subd. (e), 4019, subd. (f), as enacted by Stats. 2011, 1st Ex. Sess., ch. 12, §§ 16,

35.) Defendant contends that this formula must be applied to him, entitling him to an additional 360 days credit.

There is no question that the result sought by defendant is contrary to the express language of the amending statute, which declares that the amendments "shall apply prospectively and . . . to prisoners who are confined . . . for a crime committed on or after October 1, 2011. Any days earned by a prisoner prior to October 1, 2011, shall be calculated at the rate required by the prior law." (§ 4019, subd. (h).) As discussed below, some ambiguity appears in this language as applicable to persons in presentence custody after October 1, 2011, on crimes committed before that date. But no ambiguity appears with respect to persons sentenced before that date, as defendant was. The Legislature unmistakably declared that those persons' credits would continue to be "calculated at the rate required by the prior law."

Defendant argues that this clearly stated intention cannot be given effect without violating the equal protection clauses of the state and federal constitutions. To succeed on an equal protection claim, a defendant must show that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner. The level of judicial scrutiny brought to bear on the challenged treatment depends on the nature of the distinguishing classification. (*People v. Wilkinson* (2004) 33 Cal.4th 821, 836-837.) Unless the distinction "touch[es] upon fundamental interests" or is based on gender, it will survive an equal protection challenge "if the challenged classification bears a rational relationship to a legitimate state purpose. [Citations.]" (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1200 (*Hofsheier*); see also *People v. Ward* (2008) 167 Cal.App.4th 252, 258 [rational basis review applicable to equal protection challenges based on sentencing disparities].) Defendant does not contend that the classification here is subject to heightened scrutiny. In such a case, the statute classification must be upheld "if there is any reasonably conceivable state of facts that could provide a rational basis

for the classification. [Citations.] Where there are 'plausible reasons' for [the classification], 'our inquiry is at an end.' " (*Hofsheier, supra,* at pp. 1200-1201, italics and some internal quotation marks omitted.)

Defendant describes the two affected classes here as "those prison inmates who committed serious felonies who will receive additional conduct credits since they committed their crimes after October 1, 2011[,] and . . . those . . . inmates who committed serious felonies who will not receive additional conduct credits since they committed their crimes prior to October 1, 2011." Although the point may not be crucial to this appeal, we do not believe this accurately describes the effect of the statute as properly construed. It is true that after declaring itself to operate "prospectively," the October 2011 amendment declares that will apply "to prisoners who are confined . . . for a crime committed on or after October 1, 2011." (§ 4019, subd. (h).) Standing alone this would indeed suggest a classification based upon the date of the offense. In the next sentence, however, the Legislature declared, "Any days earned by a prisoner prior to October 1, 2011, shall be calculated at the rate required by the prior law." (§ 4019, subd. (h).) Of course it would have been impossible to earn days in presentence confinement on an offense which had not yet been committed. This sentence is therefore meaningless unless the liberalized credit scheme applies to crimes committed before the stated date. While the statute may thus seem somewhat self-contradictory, the contradiction is only implied. The ambiguity is best resolved by giving effect to both sentences and concluding that the liberalized scheme applies both to prisoners confined for crimes committed after October 1, 2011, and to prisoners confined after that date for earlier crimes. In this view, the correct classification is between prisoners earning credit for presentence confinement prior to that date and prisoners earning such credit after that date.

Defendant contends that the statute violates equal protection under the holding of *In re Kapperman* (1974) 11 Cal.3d 542 (*Kapperman*), where the court invalidated, on

equal protection grounds, a legislative declaration permitting an allowance of presentence confinement credit to operate only prospectively. The declaration concerned Penal Code section 2900.5, then only recently enacted, which required that persons sentenced to state prison receive credit for time served prior to the commencement of their sentence. The Legislature expressly limited the effect of the statute to persons delivered to correctional authorities on or after its effective date. The defendant, who had been convicted and imprisoned prior to that date, filed a habeas petition seeking credit for the 304 days he had spent in custody before entering prison. The Supreme Court found no rational basis for limiting the statute to prospective operation and declined to give effect to that limitation.

This case differs from *Kapperman* in at least two material respects. First, that case was concerned with credit for *time actually spent* in confinement, rather than, as in this case, additional credit for *good conduct* while confined. The two forms of credit are quite distinct in both conception and rationale. Credit for presentence confinement reflects the modern view that " 'when a person is incarcerated he is being punished by the reality of incarceration.' " (*In re Watson* (1977) 19 Cal.3d 646, 651, quoting *People v. Williams* (1975) 53 Cal.App.3d 720, 723.) This contrasted with the " 'older philosophy,' " under which a defendant was understood to suffer punishment for a given offense only when he had entered prison under a judgment of conviction. (*In re Watson*, *supra*, at p. 651, quoting *People v. Williams*, *supra*, at p. 723; see *In re Young* (1973) 32 Cal.App.3d 68, 71-72 [citing older cases holding that "presentence incarcerations while awaiting trial and sentence cannot be considered as part of any judgment subsequently pronounced and are not embraced within the statutory penalty of the crime for which a defendant is sentenced."].) Under the modern view, a defendant in jail awaiting sentence is in effect making an advance payment on what is popularly called his "debt to society." It has also been recognized that allowing credit for time served prior to sentencing is

necessary to avoid an invidious discrimination against indigent defendants vis à vis defendants able to afford bail. (See *In re Young*, *supra*, at p. 75; *In re Banks* (1979) 88 Cal.App.3d 864, 867; *Williams v. Illinois* (1970) 399 U.S. 235, 242.)

Withholding retroactive effect from a legislative allowance of credit for time actually served is difficult, if not impossible, to harmonize with either of these rationales. If time in jail prior to sentencing is "punishment" today, then it was also punishment yesterday, and recognizing it as such only as to those *still* in jail, while withholding such recognition as to those who have been transported to prison, is not easily explained. If such credit is granted in order to forestall an equal protection challenge on behalf of indigent defendants, its denial for past jail time seems even harder to justify. Such an enactment does not obviate the posited challenge; it only shrinks the injured class. Indeed it may strengthen the objection by the remaining class members, who may cite the liberalizing statute to show that no substantial governmental interest justifies denial of the credit as to them. (See *In re Young*, *supra*, 32 Cal.App.4th at p. 75 [enactment of Pen. Code, § 2900.5 "is evidence that the disparate result" achieved by denial of credit "does not further a compelling governmental interest that is served by classification"].)

Credit for good conduct, in contrast, may be seen to serve a distinct—and distinctly prospective—penal function: to induce good conduct on the part of incarcerated persons. (See *People v. Brown* (2004) 33 Cal.4th 382, 405 [section 4019 "focuses primarily on encouraging minimal cooperation and good behavior by persons temporarily detained in local custody"].) A promised reward cannot affect an actor's behavior until it is made known to him. It cannot alter conduct already completed when it is made. This fact—that an offender's conduct cannot be retroactively influenced—provides a rational basis for withholding retroactive effect from a statute enhancing conduct credits. (See *In re Stinette* (1979) 94 Cal.App.3d 800, 806 [prospective only application of provisions of Determinate Sentencing Act (DSL) (§ 1170 et seq.) upheld

over equal protection challenge]; *In re Strick* (1983) 148 Cal.App.3d 906, 912-913 [prospective only application of statutory changes designed to incentivize productive work and good conduct of prison inmates upheld over equal protection challenge].)

In support of a contrary conclusion defendant cites *People v. Sage* (1980) 26 Cal.3d 498 (*Sage*), where the court struck down, as violative of equal protection, a provision allowing presentence conduct credits to certain defendants ultimately convicted of misdemeanors but not to defendants, otherwise similarly situated, who were convicted of felonies. (See *id.* at pp. 507, 508.) The state cited three rationales for the denial of credit, but the court found them all equally applicable to misdemeanants. (*Id.* at pp. 507-508.) In the absence of any other posited rationale, the court concluded that the statute ran afoul of the equal protection clause. (*Id.* at p. 508.) Defendant cites the case, first, for the "implicit holding . . . that felons were similarly situated to all other jail inmates regardless of their lack of awareness of the right to earn credits." But we may assume for present purposes that those in defendant's situation are similarly situated to those who receive the benefit of the October 2011 amendments.[1] The pivotal question is whether we can infer a rational basis for treating them differently. The statute challenged in *Sage* distinguished between two classes of defendants on a basis for which the court could discern no rational basis. Given that conclusion, the affected class's "lack of awareness of the right to earn credits" appears irrelevant.

Defendant also cites the court's decision in *Sage* to make *its holding* retroactive. (*Sage, supra,* 26 Cal.3d at p. 509, fn. 7.) The court cited *Kapperman* in this context, but

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[1] Respondent asserts that "the distinction drawn" by the amendments in question "does not involve similarly situated classes of inmates." But apart from a passing attribution to *People v. Floyd* (2003) 31 Cal.4th 179 (*Floyd*), no argument is offered in support of this premise. That decision, which we discuss in somewhat greater detail below, did not adopt, let alone rest on, the premise attributed to it by respondent. Rather the court found a rational basis for the classification—as do we.

only for the general desirability of avoiding the "arbitrary classification of prisoners." (*Ibid*.) No one would contest the worthiness of that objective, but it hardly establishes that the classification before us violates equal protection. There is a considerable difference between a court's deciding the scope of its own remedy for a violation of equal protection once found, and a decision to strike down an explicit legislative denial of retroactive effect. The *Sage* court did not have any question of the latter type before it. Moreover the court did *not* make its decision *fully* retroactive, as it might have been expected to do if it shared defendant's view that equal protection required extending the more liberal credit rule to *all* affected inmates. Instead it limited relief to time served *after the effective date of the DSL*, noting that credits had not been available under the prior law and were authorized under the DSL only from its operative date forward. (*Ibid*.) The court's implicit approval of this limitation invites an adverse inference at least as significant as the "implicit holding" defendant finds there.

In sum, *Sage* is not dispositive here because it addressed no issue of retroactivity. Nor is *Kapperman* dispositive; it concerned credits for actual time in confinement rather than for good conduct.[2] A further significant distinction may be drawn between *Kapperman* and this case in that the liberalization in credit at issue there applied to

[2] Also dealing with a disparate allowance of credit for actual time in confinement was *People ex rel. Carroll v. Frye* (1966) 221 N.E.2d 262 [35 Ill.2d 604], which, as defendant notes, was cited in *Kapperman*, *supra*, at page 547, footnote 6. The central concern there was a potential constitutional infirmity in denying credit for such confinement in light of the operation of the state's bail law, which meant that persons unable to afford bail "were required to serve longer periods of imprisonment than those who were financially able to provide bail." (*Id.* at p. 264.) The statute under scrutiny had been enacted to remedy this disparity, but was made operational only as to persons sentenced after it took effect. The court declared this limitation unconstitutional as applied to offenses, such as the defendant's, which "carry a mandatory minimum term of imprisonment." (*Ibid*.) As to such offenses the court found the state's sole justification for the limitation fanciful. (See *id.* at p. 264.) In the absence of any other apparent purpose, the limitation could not stand. (*Id.* at p. 265.)

prisoners regardless of the offense for which they were imprisoned, whereas the change here affects three well-defined sub-classes of offenders: those who at the time of sentencing were "required to register as a sex offender pursuant to Chapter 5.5 (commencing with Section 290), w[ere] committed for a serious felony, as defined in Section 1192.7, or ha[d] a prior conviction for a serious felony , as defined in Section 1192.7, or a violent felony, as defined in Section 667.5." (Former Pen. Code, § 4019, subds. (b)(2), (c)(2), as enacted by Stats. 2009 3d Ext. Sess., ch. 28, § 50, p. 4428.)

The *Kapperman* court acknowledged that under longstanding authority, "statutes lessening the *punishment* for a *particular offense*" may be made prospective-only without offending equal protection principles. (*Kapperman*, *supra*, 11 Cal.3d at p. 546, second italics added, citing *In re Estrada* (1966) 63 Cal.2d 740, 744, and *People v. Harmon* (1960) 54 Cal.2d 9, 26, overruled on other grounds in *In re Estrada*, *supra*, at p. 742.) The Legislature may rationally adopt such an approach, the court wrote, "to assure that penal laws will maintain their desired deterrent effect by carrying out the original prescribed punishment as written." (*Kapperman*, *supra*, at p. 546.) The court found that rationale inapplicable, however, because the statute before it did not lessen punishment for a particular offense but rather applied across the board to all offenses. (*Ibid*.) Further, the state had not invoked the rationale on which the cited cases rested. (*Ibid*.)

In *Floyd*, *supra*, 31 Cal.4th 179, 190, the court distinguished *Kapperman* on the same ground cited in *Kapperman* to distinguish the earlier cases. The defendant in *Floyd* sought to invalidate a provision of Proposition 36 barring retroactive application of its provisions for diversion of nonviolent drug offenders. The court reiterated the acknowledgment in *Kapperman*, *supra*, 11 Cal.3d at page 546, that the Legislature may preserve the penalties for existing offenses while ameliorating punishment for future offenders in order to " 'assure that penal laws will maintain their desired deterrent effect by carrying out the original prescribed punishment as written.' " (*Floyd, supra*, 31

Cal.4th at p. 190.) The statute before it came within this rationale because it "lessen[ed] punishment for particular offenses." (*Ibid*.)

The rule of these cases appears to be that a statute ameliorating punishment for particular offenses may be made prospective-only without offending equal protection, because the Legislature will be supposed to have acted in order to optimize the deterrent effect of criminal penalties by deflecting any supposition by offenders that future acts of lenity will necessarily redound to their benefit. The only remaining question is whether the statute challenged here operated to reduce the penalty for particular offenses. In *Floyd* the statute held to come within this rule concerned "nonviolent drug possession offense[s]," which it defined to mean "the unlawful possession, use, or transportation for personal use of any controlled substance identified in Section 11054, 11055, 11056, 11057 or 11058 of the Health and Safety Code, or the offense of being under the influence of a controlled substance in violation of Section 11550 of the Health and Safety Code." (Former Pen. Code, §§ 1210.1, 1210, as adopted by Proposition 36, Stats. 2000, ppp. A-463-A-466, A-462-A-463, §§ 5, 4.) Similarly, the offenses affected here fall within three categories, each of which may be readily reduced to a list of particular crimes. (See Pen. Code, §§ 290, subd. (c), 1192.7, subd. (c), 667.5, subd. (c).) It follows that the statute here also concerned "particular offenses" and thus falls within the rule of *Floyd* rather than that of *Kapperman*. This in turn supports a finding that the statute is supported by a second rational basis, i.e., to preserve the deterrent effect of the criminal law.

We observe that the First District Court of Appeal has rejected a similar equal protection challenge on the rationale that the amendments of which defendant seeks to take advantage were adopted for a predominantly *fiscal* purpose and that the Legislature was entitled to balance that purpose against the "public safety interests" served by the preexisting credit regime. (*People v. Borg* (2012) 204 Cal.App.4th 1528, 1539; see *id.* at

p. 1538, citing Assem. Bill No. 17X (2011-2012 1st Ex. Sess.) Stats. 2011, 1st Ex. Sess. 2011-2012, ch. 12 X, § 35; Legis. Counsel's Dig., Assem. Bill No. 109 (2011-2012 Reg. Sess.); Legis. Counsel Dig., Assem. Bill No. 109 (2011-2012 Reg. Sess.) We adopt this rationale as an alternative basis for our conclusion that the statutory classification under scrutiny does not offend defendant's right to the equal protection of the laws.

DISPOSITION

The judgment is modified to strike the enhancement imposed under Penal Code section 667.5, subdivision (b). The trial court is directed to forward an amended abstract of judgment to appropriate correctional authorities. In all other respects the judgment is affirmed.

RUSHING, P.J.

I CONCUR:

PREMO, J.

I CONCUR IN THE JUDGMENT ONLY

BAMATTRE-MANOUKIAN, J.

H036888

Trial Court:	Santa Clara County Superior Court No.: 211361
Trial Judge:	The Honorable Gilbert T. Brown
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